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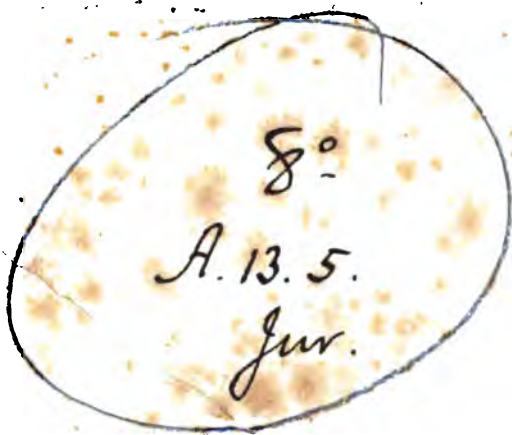
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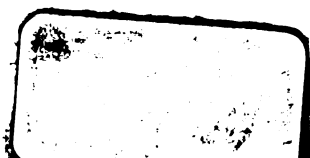


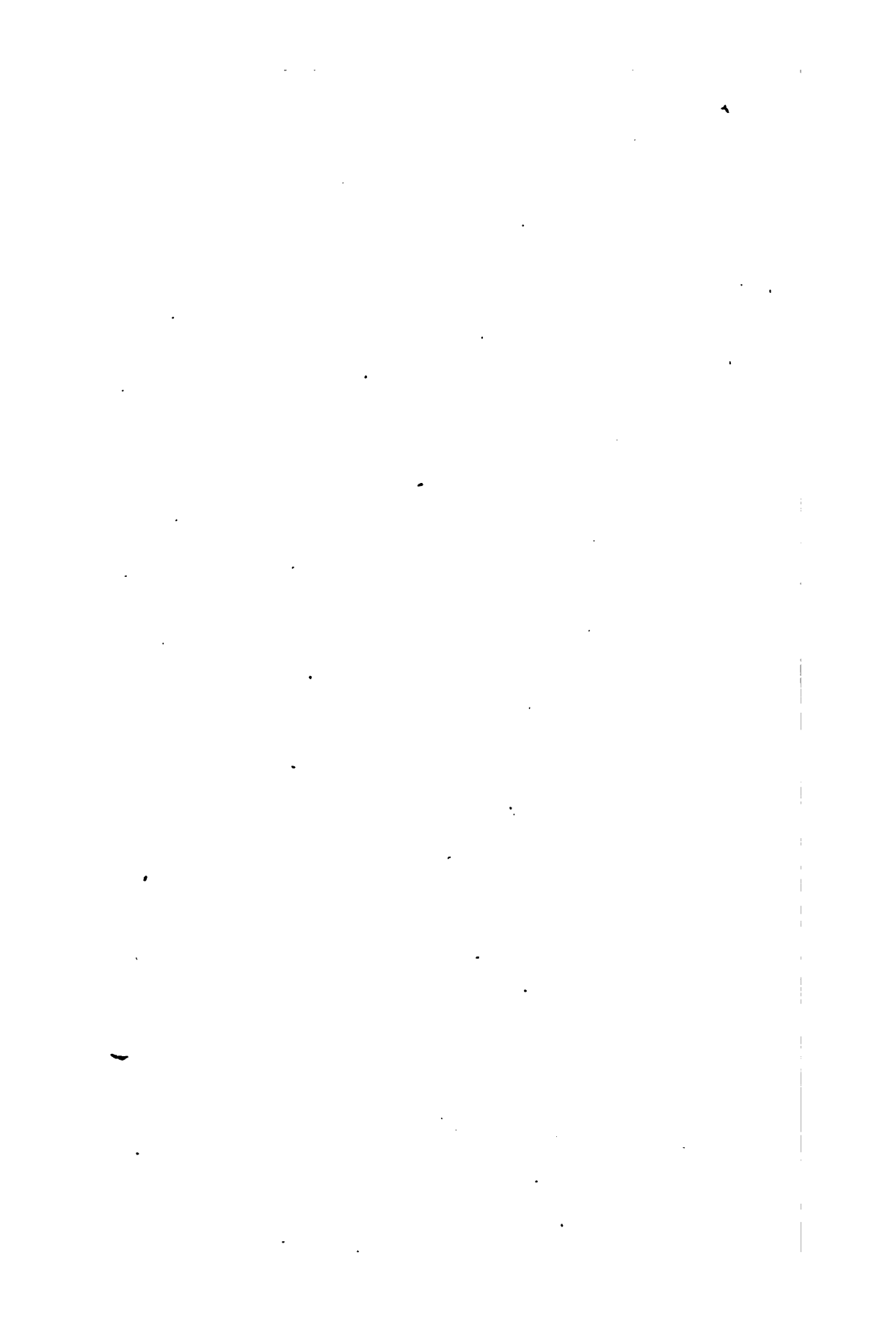


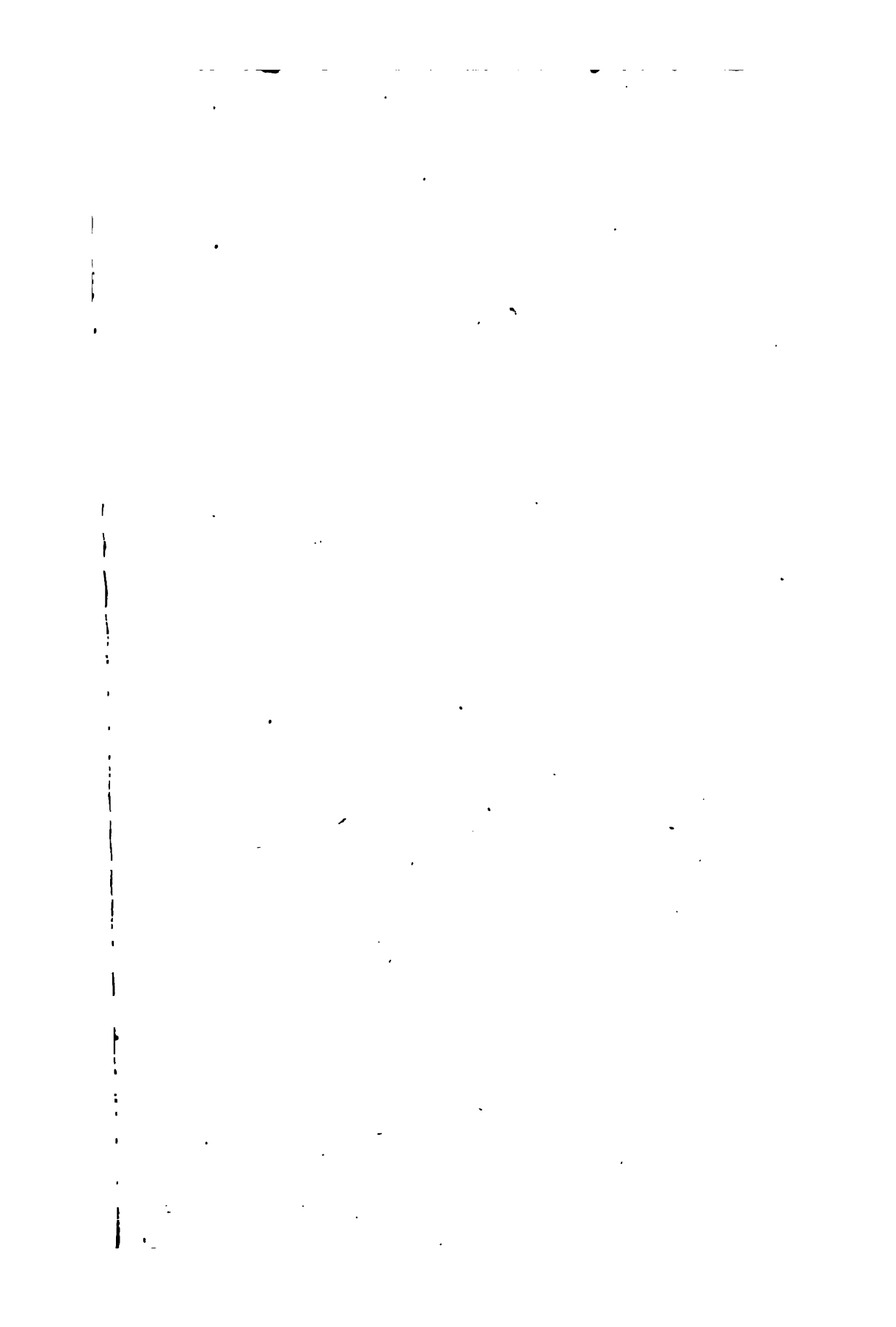
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1797.



TO
THE RIGHT HONOURABLE
LLOYD LORD KENYON,
BARON OF GREDINGTON
IN THE COUNTY OF FLINT,
LORD CHIEF JUSTICE OF ENGLAND,

THIS EDITION OF
DR. BURN'S JUSTICE OF THE PEACE,
18,
WITH HIS LORDSHIP'S PERMISSION,
MOST RESPECTFULLY DEDICATED,

BY
HIS LORDSHIP'S
MOST OBLIGED
AND OBEDIENT SERVANT,

JOHN BURN

ADVERTISEMENT

CONCERNING THE

PRESENT EDITION.

THE very favourable reception the last edition met with from the Public, hath encouraged me to continue the necessary alterations and additions to the present time, and to make such new arrangement of the cases as seemed requisite to explain the law under each respective head with greater precision. This I have been the better enabled to do from the regular publication at the end of every term of the determinations in the court of King's Bench ; in which court it mostly happens that several cases relating to the office of a justice of the peace come under consideration, and since the publication of the last edition they have amounted to a very considerable number.

In this edition the statutes are brought down to the end of 36 G. 3. and the cases to the end of Michaelmas Term 37 G. 3. And

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the reader may be assured that every attention hath been paid to make the work as perfect as possible.

The Supplementary Militia, and the Cavalry Acts, being at present of general importance, they have, together with such other acts as have passed this session, been subjoined in an Appendix.

JOHN BURN.

OSTON,
Feb. 1, 1797.

P R E F A C E

TO THE

FIRST EDITION.

THE Author proposeth in this book to render the laws relating to the subjects it treats of, a little more intelligible than hath hitherto been done.

The method he makes use of is various.

The first thing regarded is the order of *time*. Thus in the Poor Laws; first is set forth the appointment of *overseers*; next the several branches of their duty, in finding *settlements* for the poor—in removing them to such settlements—in making *rates* for their relief—in *relieving* and otherwise ordering them—and last of all, in *accounting* at the expiration of their office.—Then again, in treating of *settlements*, it occurs to consider distinctly, and as near to the said order as may be, ten different kinds of settlements—by *birth*—by the *parents* settlement—by *apprenticeship*—by *service*—by *marriage*—by *inhabiting forty days after notice*—

P R E F A C E.

by paying *parish rates*—by serving a *parish office*—by *renting* 10l. a year—and by a person's *own estate*.—In like manner, in treating of the *rates*, first is set forth the course of *laying the assessment*—then the *allowance* thereof by the justices—*publishing* the same in the church—*appeal* against the rates at the sessions—levying the same by *distress*—and finally, *commitment* where no distress can be had.

Thus to exhibit another instance—In the article of the *Woollen manufacture*, which makes up a considerable part of the justice of the peace his duty, and of the officers subordinate to him, there is such a number and variety of statutes, that authors are generally overwhelmed with them. To avoid which perplexity, the laws are here digested in order, according to the natural progress of that business; from the shearing of the sheep; to the exportation of the wool manufactured; under the several heads of *winding of wool* by the shearer—laws to prevent its *exportation*—*working* of cloth—*fulling*—*measuring*—*dying*—*stretching*—*dresssing*—*exporting*.

Where there is no priority in point of time; the next method is that of Lord Coke, to frame a definition which takes in the whole subject, and then explain the several parts of such definition in their order. Thus *Grand larceny* is defined to be, *A felonious and fraudulent taking and carrying away by any person of the mere*

mere personal goods of another; above the value of 12d. In the handling of which, the several branches of the definition are explained in the order as they stand; *viz. A felonious and fraudulent taking—and carrying away—by any person—of the mere personal goods—of another—above the value of 12d.* Under which heads the general learning relating to that whole title is comprehended.

The like method is pursued in treating of the *commission of the peace*, the form of an *indictment*, the form of an *order of removal*, and other articles.

In general, it is provided, that one thing shall clear the way for another, and the subsequent paragraphs explain the preceding.

Under the influence of which conduct, the author hath attempted to bring together under one general title, divers articles relating to the same subject, which in the common books are broken and detached under various separate titles; hoping thereby that what hath hitherto been thought introductory of confusion, may tend to render the subject more perspicuous, in exhibiting the whole under one comprehensive view. Thus the laws relating to the *game*, which are above forty in number, and are interspersed in the common books under about thirteen different titles, are here digested under one general title, *Game*, to which the reader shall have recourse for the

knowledge of whatsoever belongeth to that subject. For example, if any person would be satisfied what penalty the law hath proposed for *tracing bares in the snow*; by recurring to the general title concerning the game, he will find the game distinguished into three kinds, the *four-footed* game, the *winged* game, and the game of *fish*: The *four-footed* game are distributed into the several species of *deer*, *bares*, and *conies*; under which head concerning *bares*, he will readily find what is desired. In like manner, the *winged* game are subdivided into several branches, concerning *hawks* and *hawking*—*swans*—*partridges* and *pheasants*—*pigeons*—*wild ducks*, *wild geese*, and *other water fowl*—*grouse* or *moor game*—*berons*—and *other fowl*; each of which have their peculiar laws.

In these large comprehensive titles, care is likewise taken, to be as particular as may be without injuring the connection in the statutes, by inserting the whole law by itself, relating to each separate article. The benefit of which will appear by the following instance: If a person would know what number of horses or beasts in a cart or waggon are allowed by the statutes for the preservation of the roads; let him take what treatise at present he pleases concerning the highways, he must read over the whole, before he shall be sure that he hath found all which the law hath enacted concerning the same; and such is often the inaccuracy and confusion, that when he hath perused the whole, perhaps he may be still to seek,

For as to this instance before us, there have been regulations made concerning the same, by ten different acts of parliament, at very different times. Before he can have any competent knowledge thereof, he must lay all these ten acts together; and when he shall have done this, he will find amongst them so many repeals, and revivals, and explanations, and amendments, that it will even then be no easy matter to conclude with certainty how the law doth stand as to that article. To spare the reader all which trouble, the author hath in this, and all other the like instances, laid the whole law together relating thereunto, or at least all that hath occurred to him, or which he hath thought it material to insert. So that the reader may receive satisfaction in a very small compass, as to what he shall be inquiring about; or at least he may be satisfied in this, that if he doth not find it there, he need not seek for it elsewhere in the book*.

And by this method of bringing together, into one general title, all those separate distinct titles, which have a mutual relation to and dependance upon each other, the author hath avoided one great inconvenience, of referring the reader from one title to another, and from that other back again to the first, and (which is not unusual in books of the like kind) per-

* At present these acts are reduced into two general acts, one for turnpike roads, the other for highways not being turnpike.

haps losing the thing to be treated of betwixt them.

Upon which account also, where one law occurreth under two different titles, it is usual with him to insert the same under both those titles; so that the reader's attention may not be interrupted, by sending him to search other titles, and from those perhaps others again, which have no principal relation to the matter he hath in hand.

Also upon another account, he hath sometimes made use of more words than otherwise he would have done, namely to avoid the frequent repetition of the term, *&c.* which is a vague expression, and apt to create an uneasiness in the reader's mind, for that he cannot be satisfied from thence how much, or how little, is intended to be understood.

He hath also been somewhat large in the matter of *precedents* under divers titles; and hath endeavoured to bring them much nearer to the statutes, upon which they ought to be formed, than usually hath been done.

For all which enlargements, he hath the more space allowed to him, for that he hath not thought it necessary (as others have done) to take up near one fourth part of the book, by inserting *Blackerby's* justice at the end of it, by way of Index; hoping that the method he hath pursued will render every thing of that kind impertinent and useless.

P R E F A C E.

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THE MATERIALS which the author hath made use of, are chiefly of four kinds——The *statutes* at large——The several treatises concerning the *pleas of the crown*——the *reports* of cases adjudged in the court of king's bench——and the books concerning the *office of a justice of the peace*.

As to the *statutes* at large, or acts of parliament, the author hath not thought himself at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words; but hath constantly abridged the act in the words of the act itself, leaving out nothing which may seem any way material. And to each distinct clause, he hath annexed the interpretation thereof, where the same hath been determined in the court of king's bench, or expounded by other good authority.

The treatises concerning the *pleas of the crown*, are those of *Stamford*, *Coke*, *Hale*, and *Hawkins*. Of the first of these the author hath made little use, further than as he is adopted by the other three. As to which three great authorities, where the law hath been declared by Lord *Coke*, and not controverted by any other, nor altered since his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of these differeth from the other, he hath noted the difference.

In

In citing of Mr. *Hawkins*, he hath not thought it allowable, as is usual with others, to omit the several degrees of caution and assent, with which he delivereth his opinion; as, *it seemeth*, or *it hath been said by some*, or *it seemeth to be the better opinion*, or *it seemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inserted by him with the utmost deliberation and judgment.

As to the books of *reports*; where the cases therein have been considered by Mr. *Hawkins*, and the other learned persons before mentioned, the author hath judged it very proper to leave the matter there as settled by them. As to the rest, he hath by no means thought himself of ability to proceed in Mr. *Hawkins's* manner, by laying together all the reports on the same subject, and thereupon extracting an opinion out of the whole; but hath inserted the same at large, or what he hath thought most material thereof, and left the determination thereupon to the reader's better judgment.

And here it may be requisite, that the reader be admonished, not to expect that the book shall be more perfect than the materials of which it is composed. All the books of reports are not of equal authority. Many of them are only notes that had been taken for gentlemen's own private use; which, doubtless, would have been much more perfect, had they intended them for publication. For these, or
for

for any other; the author himself voucheth not: And, as he doth not add to their credit, so he doth not retract from it; but leaveth every author (as he needs must) to answer for himself. For he hath made it an invariable rule, upon all occasions, to cite his authorities, what such soever they be; and, in all material instances, in the very words of the original authors: that so, what may be of good authority in itself, shall not be rendered less so by his handling of it. And where no authority is alledged, he desires the reader will look upon it as such, namely, as having no authority; the same being nothing but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

The books of authority concerning the *office of a justice of the peace*, are those of *Fitzberbert*, *Crompton*, *Lambard*, and *Dalton*; the last of which was published in the reign of king *James* the first: since which time, no book under that title hath been allowed as sufficiently authentic. And even the additions which have been made to *Dalton* since his death, seem to have no better claim to an uncontrollable authority, than other collections which have not obtained it. And *Dalton* himself is much injured in the modern editions, in like manner as was observed before of Mr. *Hawkins*, by delivering that as absolute, which Mr. *Dalton* published under the several degrees of assent or doubtfulness before mentioned; and which the author, in justice to Mr. *Dalton*, hath restored.

Where

P R E F A C E.

Where *Dalton* hath adopted *Lombard*, *Crompton*, and *Fitzberbert* (which he doth most frequently in their words) the author hath thought it sufficient to cite *Dalton's* single authority. And generally, in all other cases, where authors are agreed, he hath judged it unnecessary to alledge more than one or two good vouchers.

Concerning the other books of this kind, which have been published since *Dalton's* time, it is unnecessary to enlarge; since of the most of them the author hath made no use, and of the rest very sparingly; and he will not seek to recommend his own book, by finding fault with others before him.

ORTON, WESTMORLAND,
Sept. 29, 1754.

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CONCERNING THE FIFTEENTH EDITION.

WHAT alterations have been necessary to be made from time to time since the first publication of this book, may be easily conceived from the variety of materials which have been introduced from the Reports of Cases adjudged in the courts of Westminster-hall, and the Statutes enacted during that period.

When this book was first published, in the year 1754, there had been few Reports adjudged in the reign of king George the first, and almost none in the reign of king George the second. But now this deficiency hath been abundantly supplied by a greater number of Reports of cases, determined in matters subject to the jurisdiction of the justices of the peace, than had been in the whole period before that time from the first institution of the office of that magistrate.

The Statutes or acts of parliament which ~~have~~ been made during the said time, connected more or less with the office of a justice of the peace, are in number above three hundred; besides almost half as many more that
have

have been repealed, superseded, or permitted to expire.

By the means of which statutes, so many new matters are in every session of parliament brought under the jurisdiction of these justices, and so many alterations are made in subjects of which they before had cognizance, that every new edition, in order to keep pace with the law, is in effect a new book. And this is unavoidable. To publish those alterations separately, in an annual appendix, is a work of more difficulty than may be at first apprehended. For to effect this to any sufficient purpose, many titles must be taken in pieces, and wholly new modelled; sometimes one act of parliament breaks into several different titles, all of which must be surveyed, and rendered consistent with each other, and new titles frequently arise upon new emergencies. These alterations and additions in any one year would increase to a volume of no inconsiderable dimensions, and in two or three years time would be productive of infinite confusion; and, notwithstanding all reasonable attention that might be employed, the book and the appendixes, and the several appendixes one with another, would be at variance. The best appendix that the author can imagine is, the statutes at large every year, so far as justices of the peace are concerned therein; which statutes as no acting justice ought to be without, this would therefore upon that account create unto him no additional expence.

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TO THE

SIXTEENTH EDITION.

IN the successive and numerous Prefaces to the preceding Editions, the Author has given a judicious and accurate account of the method he observed in the arrangement of this Work, and of the materials from which it was first formed, and afterwards improved; specifying also, from time to time, the various additions he had made: And in the Advertisement to the Fifteenth Edition (which the reader is requested to peruse) he has given a comprehensive view of the growth of the Work during the space of thirty-one years, which had revolved since its first appearance in 1754.

The many and very early opportunities given me by my father to observe the method he pursued in making the necessary alterations and additions to every new edition, and selecting from the Reports such adjudged cases as seemed best to explain the laws on which the determinations of the Courts were founded, and his more particular instructions to me to

VOL. I. b make

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make extracts from the new acts of parliament, and in forming other necessary collections for the work, has enabled me to pursue his plan in the present publication, which with becoming diffidence is now offered to the publick.

In the short interval between the publication of the last Edition, and my Father's death in November 1785, he continued to make his corrections as usual. These, together with the former Appendix, and all the Acts of Parliament and adjudged Cases from that time, are now interwoven under their respective heads. The acts which interfere more or less with the office of a Justice of the Peace, are so numerous within the above short period, on account of the many additional new taxes, and the new arrangement of the duties of Customs and Excise, as to amount to above *eighty*; and there are more than that number of new adjudged Cases. The Reader will not therefore be surprised at the increased bulk of the volumes; and he may be assured that no labour or attention has been spared to render the Book complete to the present time, and still worthy of that patronage with which it has been so long honoured.

JOHN BURN:

ORTON, WESTMORLAND.
August 20, 1788.

INTRODUCTION,

Consisting of TWO PARTS;

CONTAINING,

- I. *Certain abbreviations made use of in this work.*
- II. *Some general rules to be observed, in the construction of statutes or acts of parliament.*

-
- I. *Certain abbreviations made use of in this work.*

IN order to keep the book within a reasonable compass, the following *abbreviations* are made use of.

1. The word *justice* is always to be understood to mean *justice of the peace*, when not otherwise expressed. Justice.
2. The words *one justice* shall be understood to signify *one or more justices*, so that what is directed to be done by one, shall not be intended thereby to exclude others from joining with him. One justice.
3. In like manner, *two justices*, when not otherwise expressed, shall be understood to signify *two justices or more*. Two justices.
4. So also a conviction on the oath of *one witness*, shall be understood to denote *one witness or more*. One witness.

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5. And

- Two witnesses. 5. And *two witnesses* shall denote *two or more witnesses*.
- Quorum. 6. (1 2.) shall be understood to signify *one, whereof is of the Quorum*.
- Majority. 7. The *justices in sessions* shall signify the said justices, or *the major part of them*.
- Sessions. 8. The word *sessions* shall denote *the general quarter sessions*, if not otherwise expressed.
- Warrant. 9. The word *warrant* shall always signify *warrant under hand and seal*, where not expressed otherwise.
- Judge of assize. 10. Judges or justices of *assize* shall be understood to signify also those of *Nisi Prius, Oyer and Terminer, and General Gaol Delivery*.
- Mayor. 11. The word *mayor* shall always be understood to imply *bailiffs and other chief officers in corporations*, by what appellation soever dignified.
- Constable. 12. The word *constable* shall always be understood to imply *tythingmen, borsholders, headboroughs, and other officers required to execute the justices warrants*.
- Overseer. 13. The word *overseer* shall be understood to mean *overseer of the poor*, where not expressed otherwise.
- Poor. 14. Where a penalty, or part thereof is expressed to be given to the *poor*, that shall be always understood to denote *the poor of the parish where the offence was committed*, if not otherwise limited.
- Penalty. 15. Where a penalty is to be recovered before the justices of the peace, it is thought indispensable to insert particularly the manner of recovering the same; but where it is to be sued for in any of his majesty's courts of record at *Westminster*, it is judged not necessary to set forth the special method of procedure there: and generally, where it is expressed, that a person shall do, or not do such a thing, on pain of such a sum, without more, it shall be understood that such penalty is not recoverable before the justices of the peace, but only in the courts at *Westminster*.
16. In

INTRODUCTION.

XXV

16. In all cases of *distress and sale*, it shall be understood that the *overplus* must be returned to the owner; after the sum or sums to be thereout deducted, shall be satisfied and paid.

Overplus.

17. *Lands* shall be understood to stand for *lands, tenements and hereditaments*.

Lands.

18. Where *transportation* is directed for any offence, it shall always be understood, *that if the offender shall return before the time limited, he shall be guilty of felony without benefit of clergy*.

Transportation.

19. In the blank spaces for the names in the precedents, instead of inserting initial letters arbitrarily, it is thought it may be some help to the memory, that *A. O.* shall signify the offender, *A. I.* the informer, *A. W.* the witness, *J. P.* the justice of the peace, and the like.

Blank spaces.

20. Also, for brevity's sake, sums of money and other numbers are usually expressed by figures, and not in words at length; but it is to be remembered, that in the forms of warrants, convictions, and other proceedings before the justices, they ought to be expressed in words at length, and not in figures.

Figures.

21. Where a statute is said to be in force, until such a day, month, and year, &c. it shall always be understood to imply, *and from thence to the end of the then next session of parliament*.

Continuance of statutes.

22. In the statutes made in the reign of the late King *William*, it is thought not necessary upon all occasions to say *William the Third*, since there are no printed statutes in the reigns of *William the First and Second*.

Citing of statutes.

Nor is it thought necessary in such statutes to add the name of Queen *Mary* to that of King *William*; but it is judged sufficient for the understanding thereof, to quote the statutes in this manner, *viz.*

1 W. sess. 2. c. 6. s. 3. to signify the statute made in the parliament holden in the first year of the reign of King *William the Third* and Queen *Mary*,

the second session thereof, chapter the sixth, section the third.

Citing of books
and adjudged
cases.

23. Abbreviations in the names of books cited as authorities, or elsewhere occasionally noted, consist for the most part of some of the initial letters of the authors names, and other common distinctions, and more particularly in quoting *Sir William Blackstone*, the following distinction is observed: 1, 2, 3, 4, *Black.* denotes *Blackstone's Commentaries*, the first, second, third, or fourth part. *Black. Rep.* signifies *Blackstone's Reports*, which though in two volumes, yet the pages being numbered progressively without interruption through both volumes, it is judged that it will create less confusion to insert the pages only, and not the number of the volume.

The manner of quoting *Sir James Burrow* is different by different persons. That author, intending to publish reports of cases determined in the court of King's Bench during the times of the four last lords chief justices *Hardwicke*, *Lee*, *Ryder*, and *Mansfield*, begins with the last, justly supposing that the latest would be the first called for by the publick expectation, and so purposing to advance by a kind of retrograde progression; in like manner as was done in the publication of *Croke's Reports*, during the reign of *Q. Elizabeth*, *James I.* and *Charles I.* Those in the reign of *Charles I.* were first published, and so upwards through the times of *James* and *Elizabeth*, and are now commonly distinguished by the titles of *Croke Charles*, *Croke James*, and *Croke Elizabeth*. But as some authors quote the Reports in the time of King *Charles*, from their having been first printed, though last in the course of decision, by the distinction of 1 *Croke*, and those of *Elizabeth* by 3 *Croke*; so others, by the contrary rule, quote those of *Elizabeth* by 1 *Croke*, and those of *Charles* by 3 *Croke*: which is so far the parent of some confusion.

Sir

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Sir *James Burrow* intitles his Reports during the time of *L. Mansfield*, the *fourth part* of his Reports, and accordingly the same is quoted by some, "*4 Burrow.*" This fourth part consisting of five volumes in folio, is quoted by others according to the number of volumes comprehending this fourth part, thus: "*1, 2, 3, 4, 5, Burrow.*" But these five volumes having the pages numbered uniformly from 1 to 2835, it is thought most convenient in this book to keep this fourth part distinct, by the appellation of "*Burrow Mansfield,*" and so referring to the page in whichever of the five volumes the matter sought for may happen to be. By which method, when the three other parts in process of time shall come to be published (which is a thing much to be desired) they may be denominated in like manner, "*Burrow Ryder,*" "*Burrow Lee,*" and "*Burrow Hardwicke,*" which in some sort may prevent the confusion that happened in the publication of *Croke's Reports.*

The said Sir *James Burrow*, considering that it must needs be a considerable length of time before his whole collection of cases could be published, and being desirous in the mean time to oblige the publick with a regular course of decisions in *settlement cases*, selected out of his whole collection those relating solely to the settlement of the poor, during the times of the said four last lords chief justices, a most interesting period, comprehending the space of upwards of forty years; and published the same in two quarto volumes. These are quoted in this book by the title of "*Burrow's Settlement Cases.*"

The Lord Chief Justice *Hale* wrote a treatise in octavo, entitled "*Pleas of the Crown,*" containing a sketch and plan of his larger work, which was published afterwards in two volumes folio, entitled "*The History of the Pleas of the Crown.*" In quoting these, the former is distinguished thus,

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thus, *Hale's Pleas*; and the latter *Hale's Hist.* or in a more abbreviated form, *H. H.*

So also the names of the terms in which the several cases were adjudged, to wit, Hilary, Easter, Trinity, and Michaelmas, are expressed by the initial letters *H. E. T.* and *M.*

II. *Some general rules to be observed in the construction of statutes or acts of parliament.*

To avoid repeating the same observations some hundreds of times, it is thought proper to premise the following general rules to be observed, in the construction of statutes or acts of parliament.

How far an affirmative repealeth an affirmative statute.

1. Regularly, a statute in the affirmative doth not repeal a precedent affirmative statute. *11 Co. 61.*

But if the latter is contrary to the former, it amounteth to a repeal of the former. *L. Raym. 160.*

How far an affirmative statute altereth the common law.

2. A statute made in the affirmative, without any negative expressed or implied, doth not take away the common law; and therefore the party may wave his benefit by such statute, and take his remedy by the common law. *2 Inst. 200.*

Repealing a repealing statute.

3. By repealing of a repealing statute, the first statute is revived. *Readings upon the statutes. Parl.*

Special power to be pursued,

4. Regularly, where an act of parliament giveth a power or interest to one person certain, by this express designation of one, all others are excluded. *11 Co. 59. 64.*

Power to administer an oath.

5. In all cases, where justices may take examinations, or other accusation or proof, though the statute doth not expressly set down that it shall be upon oath, yet it shall be intended that it shall be upon oath. *Dalt. c. 115.*

In what case the sessions may execute the power given to two justices.

6. Generally, it is holden, that where a statute appoints a thing to be done by one or more justices without giving any appeal to the sessions; there the justices in sessions may do that thing: but where

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an appeal is given to the sessions, the justices in sessions cannot proceed originally therein, because that method would take away the power of appealing.

7. Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, without mentioning an indictment; it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment: Yet it hath been adjudged, that if such statute give a recovery by action of debt, bill, plaint, information, or otherwise, it authorizes a proceeding by way of indictment. 2 *Haw.* 211.

How far an indictment will lie where another method of prosecution is appointed.

And if there is a prohibitory clause in the act, the offender may be indicted upon the prohibitory clause, notwithstanding the penalty: But otherwise it is, where the act is not prohibitory, but only inflicts the forfeiture, and specifies the remedy. 2 *H. H.* 171. *Burrow, Mansfield*, 543.

But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding; there, either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute: because in that case the sanction is cumulative, and doth not exclude the common law proceeding. *Bur. Mansf.* 803.

8. But every contempt of a statute is indictable, where no other punishment is limited. 1 *Haw.* 60.

Where no method of prosecution is appointed.

9. And wheresoever an act of parliament doth generally prohibit any thing, the party grieved shall not only have his action for his private relief, but the offender shall be punished at the king's suit, for the contempt of the law. 2 *Inst.* 163.

Where the defendant may be prosecuted both by the king, and the party grieved.

10. All

In what time
prosecution
shall be on penal
statutes.

10. All actions, indictments, or informations, on penal statutes, for any forfeiture limited to the king, shall be brought within two years after the offence committed; if limited to the king and prosecutor, then within one year; and if it is not sued for in that one year, then the king may sue for the same within two years, after the expiration of that one year; and not otherwise. 31. *El. c. 5. 1605.* That is to say, unless where it is otherwise specially directed by subsequent statutes.

Statutes not in
the name of the
whole legisla-
ture.

11. Many ancient statutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning the concurrence of either lords or commons; yet inasmuch as they have always been acquiesced in as unquestionably authentick, this establishes and confirms their authority, and the defect is salved by such universal reception. *Hawkins's preface to the Statutes.*

Preamble.

12. The preamble or rehearsal of a statute is deemed true; and therefore good arguments may be drawn from the preamble. 1. *Inst. 11.* But the preamble shall not restrain the operation of the enacting part; as where the preamble reciteth only a particular inconvenience, this shall not hinder a subsequent enacting clause from being understood in that more general sense which the words would otherwise and of themselves import so as to take in other inconveniencies of the like kind, altho' not specified in the preamble. 3. *Mod. 144.* 1. *P. Will. 320.*

May do such a
thing how to
be understood.

13. Where a statute directs the doing of a thing, for the sake of justice, or the publick good; the word *may* is the same as the word *shall*: as where the statute of the 13 & 14 C. 2. c. 12. enacts that the overseers may make a rate to reimburse the constables, this is construed they *shall*; for they are compellable so to do. 2. *Salk. 609.*

Court of record.

14. Where a statute directs a penalty to be recovered in any court of record; this shall not be intended

tended of the quarter sessions, unless it be specially named in such statute; but only of the courts of record at *Westminster*. 6 Co. 19, 20. 2 *Hale's Hist.* 29, 30.

15. It is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words; as where a statute speaks of indictments to be taken before justices of the peace, or *others having power to take indictments*, it shall be understood only of other inferior courts, and not of the king's bench, or other courts at *Westminster*. 2 Co. 46. 2 *Haw.* 305.

Higher courts not intended where the inferior are first mentioned.

16. Where a statute gives power to the justices, to require any person to do a thing, as to take the oaths, the law implicitly gives them power to issue their precept to have the body before them; for when the law granteth any thing to any one, that also is granted, without which the thing itself cannot be; And it is against the office of the justices, and the authority given them by the law, that they shall go and seek the parties. 12 Co. 130, 131.

Power to convene the parties.

17. Where a statute gives power to the justices of the peace, to hear and determine an offence in a summary way; it is necessarily implied, and supposed, as a part of natural justice, that the party be first cited, and have opportunity to be heard and answer for himself. 1 *Haw.* 154.

Necessity of summoning the party.

18. Where an act of parliament gives power to two justices finally to hear and determine an offence, it is necessarily supposed, that they shall be both together, or which is the same thing in other words, that they shall hold a special sessions for that purpose. And the like is, when they are to do any other judicial act, as to make an order of bastardy, or adjudge the settlement of a poor person. For it is unknown to the laws of *England*, that two persons shall act as judges in the same cause, when at the same time one of them is in

Two justices to be both together.

in one part of the country, and the other in another.

Informer's oath. 19. Where a statute appoints a conviction to be on the *oath of one witness*; this ought not to be by the single oath of the informer; for if the same person shall be allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward. *L. Raym.* 1545.

Confession. 20. Where a statute directeth, that a person shall be convicted of an offence, upon the *oath of one or more witnesses*, and saith nothing of the *confession* of the party; yet if the offender shall before the justice confess the offence, he may be convicted upon such confession: for confession is stronger evidence than the oath of witnesses. *Dalt.* 109. 162. *Str.* 546.

Discretionary power. 21. Where an act of parliament gives power to the justices of the peace, to take order in any matter *according to their discretions*; this shall be understood, according to the rules of reason, law, and justice, and not by private opinion. *5 Co.* 100.

England includes Wales. 22. In all cases where *the kingdom of England*, or *that part of Great Britain called England*, hath been or shall be mentioned in any act of parliament; the same shall be deemed to comprehend *the dominion of Wales, and town of Berwick upon Tweed*. 20 G. 2. c. 42. s. 3.

Twelve months. 23. It may be laid down as an invariable rule, that *the law favours liberty*: So that in the construction of a penal statute, where the interpretation is dubious, that sense must be pursued (all other things being equal) which is more beneficial to the subject, or the party suffering. Thus, where an act directs, that the justices shall commit an offender to prison for 12 *months*, the justices may not alter the words, and commit him for a *year*; for in this respect, 12 months and one year are not the same: but the months must be com-

puted at 28 days to the month, and not as kalendat months, unless it be so expressed in the act.

24. In all cases wherein, by any act of parliament, an oath shall be allowed or required; the solemn affirmation of quakers shall be allowed instead of such an oath, altho' no particular or express provision be made for that purpose in the said act. 22 G. 2. c. 46. s. 3. Quaker's affirmation.

But no quaker shall by virtue hereof be qualified or permitted to give evidence in any criminal cause, or serve on any jury, or bear any office or place of profit in the government. s. 37.

25. To say that a person shall *forfeit* generally, or that he shall *forfeit to the king*, is all one; for the king shall have every forfeiture not otherwise limited. 11 Co. 60. Forfeiture.

Except where a forfeiture is *given in lieu of property and interest*; for there it shall go to the party injured. 1 Roll's Rep. 90.

For wheresoever a statute giveth a forfeiture or penalty, against him which wrongfully detaineth or dispossesseth another of his duty or interest; in that case, he that hath the wrong shall have the forfeiture or penalty, and shall have an action for the same upon the statute, and the king shall not have the forfeiture in that case. 1 Inst. 159.

26. Where a statute saith, that such a person shall pay *fine and ransom* to the king; in legal understanding, such fine and ransom are all one: for if they were divers, then should the party pay two sums, one for the fine, and another for the ransom; which was never done. 1 Inst. 127. Fine and ransom.

27. Acts of parliament that speak of fines or ransoms *at the king's pleasure*, are always to be understood of the king in his courts by his justices. 1 H. H. 375. At the king's pleasure.

28. It is said that wheresoever a justice of the peace is empowered, by any statute, to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be Where a power of commitment is implied.

INTRODUCTION.

- be bound, or to do such thing; the justice may commit him to the gaol, to remain there till he shall comply. 2 *Haw.* 116.
- Imprisonment, when. 29. When a statute appoints imprisonment, but limits no time when; it shall be immediately. 8 *Co.* 119.
- Imprisonment, how long. 30. When a statute appoints imprisonment, but limits no time how long; the prisoner in such case must remain at the discretion of the court. *Dalt.* 410.
- Commitment to the house of correction, for what time. 31. Where any offender shall by a justice of the peace be committed to the house of correction for an offence cognizable before him out of sessions, and the time and manner of punishment is not by law expressly limited; he may commit him to the house of correction, *there to be kept to hard labour until the next general or quarter sessions, or until discharged by due course of law.* 17 *G.* 2. c. 5. s. 32.
- Statute making an offence felony. 32. Wherever a statute makes any offence felony; it incidentally gives it all the properties of felony at common law. 1 *Haw.* 105.
- Misprison. 33. Therefore an act of parliament that makes an offence felony; doth consequently introduce the punishment of concealing, that is, misprison of felony; and every offence made felony by act of parliament, includeth misprison. 1 *H. H.* 708.
- Infants. 34. An act making a new felony, extendeth not to infants under 14 years of age; but if they be of that age it binds them. 1 *H. H.* 706.
- Life and member. 35. Not only those crimes which are made felonies by the express words of any statute; but also those which are decreed to have or undergo judgment of life and member, do become felonies thereby, whether the word felony were mentioned or not; 1 *Haw.* 107.
- Body and goods. 36. But an offence shall never be made felony, by the construction of any doubtful and ambiguous words of a statute; and therefore if it be only prohibited under pain of forfeiting body and goods, or of being

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being at the king's will for body, lands, and goods, it shall amount unto no more than a high misdemeanor, punishable by imprisonment or the like.

1 *Haw.* 107.

37. All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and says, the offender shall suffer death, clergy lies notwithstanding, and is never ousted without express words. 3 *Inst.* 73. 2 *Haw.* 342.

Benefit of cler-

gy.

38. Saving of dower in a statute making an offence felony, is superfluous; for by the 1 *Ed.* 6. c. 12. dower is not lost by the felony of the husband. s. 17.

Forfeiture of
dower.

39. Where any complaint shall be made before a justice, and a warrant or summons shall issue in consequence thereof; the justice, upon hearing and determining the matter, may award costs to either party: But if the conviction be upon a penal statute, and the penalty amounts to 5l. or upwards, the costs shall be deducted out of the penalty. 18 *G.* 3. c. 19.

Costs.

40. Upon an indictment or other criminal prosecution, no damages can be given to the party grieved: But it is every day's practice in the court of king's bench, to induce defendants to make satisfaction to the prosecutors, by intimating an inclination on that account to mitigate the fine due to the king. 2 *Haw.* 210.

Damages.

41. Where a statute gives treble damages; the justices are not to assess the damages, and then treble them; but the jury ought to find the damages, and then the justices are to treble them. *Cro. Car.* 449.

Treble damages.

42. In all cases where a justice is or shall be required, by any act of parliament, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by such act; it shall be lawful for such justice granting the warrant, therein to order and direct the goods distrained to be sold within a certain time to be limited

Distrain and sale.

limited in such warrant, so as such time be not less than 4 days, nor more than 8 days, unless such penalty or sums of money, together with reasonable charges of taking and keeping the distress, be sooner paid. And the officer making such distress, may deduct the reasonable charges of taking, keeping, and selling the said distress; and the overplus (if any) shall be returned to the owner on demand. (Except only in cases of distress for quakers tithes and church rates.) 27 Geo. 2. c. 20.

Second offence:

43. An act inflicting a penalty for a *second offence*, must always be understood, after conviction and judgment for the first offence; and the second offence must be committed after the first conviction, and judgment thereupon given: for it doth not appear to be an offence, until judgment by proceeding of law be given against the offender. 2 Inst. 468.

And the indictment for a second offence, must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved: but the matter of the first conviction shall never be re-examined, but must stand for granted. 1 H. H. 686.

Abjura-

Abjuration Oath. See Oaths.

Accessory.

- I. Of accessories in general.
- II. Of accessories before the fact.
- III. Of accessories after the fact.
- IV. How they are to be proceeded against.

I. Of accessories in general.

ACCESSARY (*quasi accedens ad culpam*) is he that is Accessory what;
not the chief actor, but one that is concerned in the
felony by commandment, aid, or receipt.

In the highest capital offence, namely, high treason, In the highest offence, no accessories.
 there are no accessories, neither before nor after; for the confesters, aiders, abettors, and knowing receivers and comforters of traytors are all principals. 1 *Hale's Hist.* 613.

But yet as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. *Id.*

In cases that are criminal, but not capital, as in *petit larceny*, and *trespass*, there are no accessories; for the accessories *before* are in the same degree as principals; and accessories *after*, by receiving the offenders, cannot be in law under any penalties as accessories, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. *Id.* In the lowest offences, no accessories.

It remains therefore, that the business of this title of accessories refers only to *capital felonies*, whether by the common law, or by act of parliament. Accessories only in felony.

Concerning which, *L. Coke* observes generally, that when an offence is felony, either by the common law, or by statute, all accessories both before and after are incidentally included. 3 *Inst.* 59. Accessories implied in felony.

But as to felonies by act of parliament, *L. Hale* distinguishes thereupon as follows: Regularly (he says) if Accessories in felonies by statute.
 Vol. I. B an

Accessory.

an act of parliament enact an offence to be felony, tho' it mention nothing of accessaries before or after, yet virtually and consequentially those that counsel or command the offence are accessaries before, and those that knowingly receive the offender are accessaries after. 1 H. H. 613.

But if the act of parliament that makes the felony, in express terms comprehend accessaries before, and make no mention of accessaries after, namely, receivers or comforters, there it seems there can be no accessaries after; for the expression of procurers, counsellors or abettors, all which import accessaries before, make it evident, that the law-makers did not intend to include accessaries after, which is an offence of a lower degree than accessaries before. 1 H. H. 614.

And altho' it be generally true, that an act of parliament creating a felony, renders consequentially accessaries before and after within the same penalty, yet the special penning of the act sometimes varies the case: Thus the statute of 3 H. 7. c. 2. for taking away women, makes the taking away, and the procuring and abetting, yea and wittingly receiving also, to be all equally *principal* felonies, and excluded of clergy. Again the statute of 27 Eliz. c. 2. makes the coming in of a jesuit *treason*, the receiving or relieving of him *felony*, the contributing of money to his relief a *præmunire*. So that acts of parliament may diversify the offences of accessory or principal, according to the various penning thereof, and so have done in many cases. 1 H. H. 614, 615.

How far accessaries by statute shall have their clergy.

Also a statute excluding the principals from the benefit of clergy, doth not thereby exclude the accessaries before or after; neither doth a statute, excluding the accessaries, thereby exclude the principals. 2 Haw. 342.

II. Of accessaries before the fact.

Accessory before.

An accessory before the fact committed, is he that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.

Being absent at the time of the felony committed] For if he is present, he is not an accessory, but a principal.

So also, if divers come to commit an unlawful act, and be present at the time of the felony committed, tho' one of them only doth it, they are all principals. *Hale's Pl. 215.*

So if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if

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one present deliver his weapon to the other that strikes : for they are *present*, aiding, abetting, or comforting. *Id.* 216.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour (if need be) the escape of those who are more immediately engaged : they are all, provided the fact be committed, in the eye of the law *present* at it. For it was made a common cause with them ; each man operated in his station at one and the same instant towards the same common end ; and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprize. *Foster's Crown Law*, 350.

But if one came casually, not of the confederacy, tho' he hindered not the felony, he is neither principal nor accessory, altho' he apprehend not the felon ; but for his negligence he is punishable by fine and imprisonment. *Hale's Pl.* 216. 2 *Haw.* 313.

Also in some cases, even a person absent may be principal ; as he that puts poison into any thing to poison another, and leaves it, tho' not present when it is taken : And so it seems all that are present when the poison is so infused, and consenting thereunto. *Hale's Pl.* 216.

Procure, counsel, command, or abet] But here note some diversities : As,

(1) *When the principal doth not accomplish the fact altogether in the same sort, as it was beforehand agreed between him and the accessory.* And therefore if one commands another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessory to the robbery ; for his command might have been performed without any robbery. *Dalt. c.* 161.

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof ; the person commanding shall be accessory to the murder : for it is a hazard in beating a man, that he may die thereof. *Id.*

(2) *He that commandeth or counselleth any evil or unlawful act to be done, shall be adjudged accessory to all that shall ensue upon the same evil act, but not to any other distinct thing.* As if one command another to steal a horse, and he stealeth an ox ; or to rob a man by the highway of his money, and he robs him in his house of his plate ; or to burn such a

Accessory.

one's house, and he burneth the house of another ; These are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessory to them. *Id.*

(3) But if a person commit the same felony, which another did command or counsel to be done, tho' he doth it at another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessory. As if he doth counsel to kill a man by poison, and he kills him with a dagger ; or to kill him by the highway, and he kills him in his house ; or to kill him one day, and he kills him on another day ; in these and the like cases he shall be accessory. *Id.*

(4) Those offences which in the construction of law are sudden and unpremeditated, cannot have any accessories before. As killing a man by misadventure, in his own defence, or manslaughter : For in such case there can be no procuring, counselling, commanding, or abetting. But there may be accessories after. 1 H. H. 616.

(5) It seems to be generally agreed, that he who barely conceals a felony, which he knows to be intended, is guilty only of a misprision of felony, and shall not be adjudged an accessory ; for this is not procuring, counselling, or abetting. 2 Haw. 317.

(6) Also, if a man counsels or commands another to kill a person, and before he hath killed him, he who counselled or commanded it, repents and countermands it, charging him not to kill him, and yet after he doth kill him ; here such person countermanding shall not be adjudged accessory to the murder : For, generally, the law adjudgeth no man accessory to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c. 161.*

(7) But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice ; he is an accessory to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it : For the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. 2 Haw. 315.

III. Of accessories after the fact.

Accessory after. Accessory after the fact is, where a person knowing the felony to be committed by another, relieves, comforts, or assists the felon.

Knowing

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Knowing the felony to be committed] There can be no doubt, but that it is necessary that the receiver have notice of the felony, either express or implied, and so to be laid in the indictment, that the receiver *knew* that the person received by him, had committed the principal felony. 2 *Haw.* 319.

The felony] This, as hath been said, holds place only in felonies, and in those felonies, where by the law-judgement of death regularly ought to ensue; and therefore not in petit larceny. 1 *H. H.* 618.

And therefore if a person do barely receive, comfort or conceal an offender guilty of any common trespass, or inferior crime of the like nature, tho' he knew him to have been guilty, and that there is a warrant out against him, yet he is not an accessory to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindering the due course of justice. 2 *Haw.* 311.

Relieves, comforts, or assists the felon] In the explication of these words several things are considerable:

(1) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessory to the felony; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 *Haw.* 317.

(2) But if a man knows that a person hath committed a felony, but doth not discover it, this doth not make him an accessory, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 *H. H.* 618.

(3) Also if a man sees another commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessory. *Id.*

(4) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessory; but if he take money of the felon to suffer him to escape, this makes him accessory: And so it is if he shuts the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessory; for here is not a bare omission, but an act done by him to accommodate the felon's escape. 1 *H. H.* 619.

(5) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or vo-

Accessory.

luntarily suffers him to escape, is an accessory to the felony. 2 *Haw.* 318.

(6) But if a felon be in prison; he that relieves him with necessary meat, drink, or cloaths, for the sustentation of life, is not accessory. 1 *H. H.* 620.

(7) So if he be bailed out; it is lawful to relieve and maintain him, for he is still in some sort in custody, and is under a certainty of coming to his trial. *Id.*

(8) But if a felon be in gaol; for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessory: for tho' common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621.

(9) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessory; but it is a high contempt. *Hale's Pl.* 219.

(10) A man may be accessory to an accessory, by the receiving of him knowing him to be an accessory to felony. 1 *H. H.* 622.

(11) If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessory; but if he take money of him to favour him, whereby he escapes, this makes him accessory. 1 *H. H.* 619.

(12) And if any person shall receive or buy stolen goods; knowing them to be stolen; or shall receive, harbour, or conceal the thieves; he shall, where the original offence admitted of accessories, be deemed an accessory, and be transported for fourteen years. 3 *W. & 9. f. 4.* 1 *Ann. f. 2. c. 9.* 5 *Ann. c. 31. f. 5.* 4 *Geo. c. 11.* And buying the goods at an under value, is a presumptive evidence, that he knew they were stolen. 1 *H. H.* 619.

(13) And where any goods (except lead, iron, copper, brass, bell-metal, and solder) shall have been stolen, where the felony shall amount to grand larceny, or some greater offence, and the person actually committing such felony hath not been before convicted; such offender shall be exempted from being punished as accessory, if the principal shall be afterwards convicted. 22 *G. 3. c. 58. f. 1.*

(14) It seems agreed, that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessory to felony by any receipt given to her husband; yet if she be any way guilty of

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of procuring her husband to commit it, it seems to make her an accessory before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation besides that of a wife to her husband, will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another. 2 Haw. 320.

(15) But if the wife alone, the husband being ignorant of it, do receive any other person being a felon; the wife is accessory, and not the husband. 1 H. H. 621.

(16) But if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

IV. How they are to be proceeded against.

By 3 Ed. 1. c. 15. Those who are accused of the receipt of felons, or of commandment, or force, or of aid in felony done, shall be bailable; but this seemeth to be only where it stands indifferent whether the party be guilty or innocent: for if there are strong presumptions of guilt, it seemeth that he is not bailable. 2 Haw. 102.

Accessories how far bailable.

Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessory may be indicted in the county where the death shall happen. 2 & 3 Ed. 6. c. 24. s. 2, 3.

In what country to be tried.

Also, where a murder or felony shall be committed in one county, and the person shall be accessory in another county, the accessory may be indicted in the county where he was accessory: And the judges of assize, or two of them, of the county where the offence of the accessory shall be committed, on suit to them made, shall write to the keeper of the records where the principal shall be convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged; which he shall certify under his seal. 2 & 3 Ed. 6. c. 24. s. 4.

The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony. 1 H. H. 623.

It seemeth that the accessory may be put to answer for the principal hath appeared, but his plea cannot be before such appearance, unless he desires it himself.

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he will put himself upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good. 2 *Haw.* 322. 1 *H. H.* 623.

But it seemeth necessary in such case to respite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him: But if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 1 *H. H.* 623, 624.

Both tried by
one inquest.

It seems to be settled at this day, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted, and that the jury shall be charged, that if they find the principal not guilty they shall find the accessory not guilty. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined: for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

Accessory may
be tried, tho'
the principal be
not attainted.

Anciently the accessory could not be tried, unless the principal were attainted (3 *Ed. 1. c.* 14.) but by the 1 *Ann. stat.* 2. c. 9. s. 1. if the principal be convicted, or peremptorily challenge above twenty of the jury, the accessory may be tried and punished as if the principal had been attainted; and this, altho' the principal be admitted to his clergy, pardoned, or otherwise delivered before attainer.

Receiver of stolen
goods may
be tried before
the principal.

But in the case of stolen goods, if the principal cannot be taken, the buyer or receiver may be prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, altho' the principal be not convicted; which shall exempt the offender from being punished as accessory, if the principal be afterwards taken and convicted. 1 *Ann. stat.* 2. c. 9. s. 2. 5 *Ann. c.* 31. s. 6. And by the 29 *Geo. 2. c.* 30. the buyer or receiver of stolen lead, iron, copper, brass, bell-metal, or solder, may be convicted, altho' the principal hath not been convicted; and shall be transported for fourteen years.

And by the 10 *G. 3. c.* 48. Every person who shall buy or receive any stolen jewel or jewels, or any stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall, in all cases where such jewel or jewels, or gold or silver plate shall have been feloniously stolen, accompanied with a burglary actually committed

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mitted in stealing the same, or shall have been feloniously taken by a robbery on the highway,—be triable as well before conviction of the principal felon whether he be in or out of custody, as after his conviction: and if such person so buying or receiving shall be convicted thereof, he shall be guilty of felony, and transported for 14 years.

It seemeth not reasonable, Mr. *Hawkins* says, where a person is charged as accessory to more than one principal, to try him on the conviction of one, before all of them have appeared; because hereby he may be subject to the hardship and hazard of two trials for his life for the same offence, which is contrary to the general course of the law. 2 *Haw.* 323.

Case where a person is charged as accessory to more than one.

But if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. *Foss.* 361.

And therefore the court in their discretion (Sir *Michael Foster* says) may arraign him as accessory to such of the principals who are convicted; and if he be found guilty as accessory to them or any of them, judgment shall pass upon him: But on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others, and when they come in and are convicted and attainted, or if judgment of outlawry passeth against them, he may be arraigned *de novo* as accessory likewise to them. Altho' it is the safer course (according to lord *Hale*) to respite the arraignment of the accessory, till all appear or are outlawed. *Foss.* 361.

If the principal be erroneously attaint, yet the accessory shall be put to answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder, reverseth the attainder of the accessory. 1 *H. H.* 625.

Case where the principal is erroneously attainted.

But upon this, Sir *Michael Foster* distinguisheth as follows: If the principal and accessory are joined in one indictment and tried together, which seems to be the most eligible course where both are amenable to the court; there is no room to doubt, whether the accessory may not enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law tending to his acquittal. For the accessory is in this case to be considered as a partner in the suit, and this sort of defence necessarily and directly tendeth to his own acquittal. *Foss.* 365.

But when the accessory is brought to his trial, after the conviction of the principal; it is not necessary to enter into a detail of the evidence on which the conviction was founded.

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founded. Nor doth the indictment aver that the principal was in fact guilty. It is sufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence against the accessory, sufficient to put him upon his defence. For it is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must, as it seemeth, give way to facts manifestly and clearly proved. As against the accessory, the conviction of the principal will not be conclusive; it is as to him *res inter alios acta*. *Id.*

And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged; the accessory may avail himself of this, and ought to be acquitted. *Fest.* 365.

And as in point of *law*, so also in point of *fact*, if it shall manifestly appear in the course of the accessory's trial, that the principal was innocent; common justice seemeth to require that the accessory should be acquitted. As suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder. Another is afterwards indicted as accessory to this murder; and it cometh out upon the trial by incontestable evidence, that the person who was supposed to be murdered is still living; in this case certainly the person indicted as accessory shall be acquitted. Or suppose the person to have been in fact murdered, and that it should come out in evidence to the satisfaction of the court and jury, that the witnesses against the principal were mistaken in his person (a case of this kind Sir *Michael Foster* says he has known), that the person convicted as principal was not nor could possibly have been present at the murder. *Id.* 367, 368.

Accessory acquitted may be indicted as principal.

Whether the principal acquitted may be indicted as accessory before.

If one person be indicted as principal, and another as accessory, and both be acquitted; yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. 1 *H. H.* 625.

But if a person be indicted as principal and acquitted; lord *Hale* says, he shall not be indicted as accessory before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *H. H.* 626.

But Sir *Michael Foster* observes upon this, that in the eye of the law, the offences of principal and accessory do specifically differ; and if a person indicted as principal, cannot be convicted upon evidence tending barely to prove him

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him to have been accessary before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second for an offence specifically different from it. *Fost.* 362.

So if a man be indicted as principal, and acquitted; he may be indicted as accessary after, for they are offences of several natures. 1 *H. H.* 626.

And so it is if he be indicted as accessary before, and acquitted; yet for the same reason he may be indicted as accessary after. 1 *H. H.* 626.

Principal acquitted may be indicted as accessary after.

Accessary before acquitted, may be indicted as accessary after.

Indictment of an accessary before the fact, taken from *Coke's* report of *Lord Sanchar's* case, 9 *Co.* 116. which, as the prosecution was by the king's special command, was probably drawn by good advice; and on which *Robert Creighton* esquire, (*Lord Sanchar of Scotland*) was convicted and hanged; viz.

Middlesex. **T**HE jurors do present for the lord the king upon their oath, That whereas Robert Carliel late of London, yeoman, and James Irweng late of London aforesaid, yeoman, not having God before their eyes, but seduced by the instigation of the devil, the eleventh day of May in the year of the reign of our lord James by the grace of God of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, at London, that is to say, in the parish of St. Dunstan in the West, and in the ward of Farringdon without London aforesaid, &c. with force and arms, &c. feloniously and of their aforesought malice, in and upon one John Turner then and there in the peace of God and of the said lord the king being, made an assault and affray, and the aforesaid Robert Carliel a certain gun [tormentum] called a pistol, of the value of 5 s, then and there charged with gunpowder and a leaden bullet, which gun the said Robert Carliel in his right hand then and there had and held, in and upon the aforesaid John Turner then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid Robert Carliel, with the leaden bullet aforesaid from the gun aforesaid then and there shot and discharged, the aforesaid John Turner, in and upon the left part of the breast of him the said John Turner, near the left pop of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there with the leaden bullet aforesaid out of the gun aforesaid then and there shot off and discharged, in and upon the left part of the

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the breast of him the said John Turner, one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, instantly died: And that James Irweng feloniously, and of his forethought malice, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid Robert Carliel to the felony and murder aforesaid in form aforesaid to be done and committed; and so the aforesaid Robert Carliel and James Irweng the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice, killed and murdered, against the peace of the lord the now king his crown and dignity; And that one Robert Creighton, late of the parish of St. Margaret in Westminster, in the county of Middlesex, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid by the aforesaid Robert Carliel and James Irweng in manner and form aforesaid done and committed, that is to say, the tenth day of May in the year of the reign of our lord James by the grace of God of England, France, and Ireland, king, defender of the faith, and so forth, the tenth, and of Scotland the forty-fifth, the aforesaid Robert Carliel, at the aforesaid parish of St. Margaret in Westminster aforesaid, in the county of Middlesex aforesaid, to the felony and murder aforesaid, in manner and form aforesaid to be done and committed, maliciously, feloniously, voluntarily and of his forethought malice, did incite, move, abet, counsel and procure, against the peace of the said lord the king that now is, his crown and dignity.

If after the fact, then the form may be thus;

And that A. O. late of ——— in the county of ——— yeoman, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the ——— day of ——— in the ——— year of the reign of ——— at ——— aforesaid in the county aforesaid, with force and arms, him the said ——— did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.

Action popular. See Information;

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TO prevent the inconvenience of troubling one person for another, it is enacted by 1 H. 5. c. 5. that in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants additions shall be made, of their estate or degree or mystery, and of the towns or hamlets, or places, and counties, of which they were, or be: and if by process upon the said original writs, appeals, or indictments, in which the said additions be omitted, any outlawries be pronounced, they shall be void; and before the outlawries pronounced, the said writs and indictments shall be abated by the exception of the party.

In which the exigent shall be awarded] The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded; and therefore it extendeth not to an indictment for encroaching on the highway, because in that case process of outlawry lieth not, but a distress. *Croke Eliz.* 148.

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other suits by his christian name and surname, and that, before this act, sufficed; but if he had a name of inferior dignity (as knight or banneret) he ought to be named by his christian name and surname, and by the addition of his name of dignity. 2 *Inst.* 665.

If there be a corporation of one sole person, that hath a fee simple, and may have a writ of right, he may be named by the common law by his christian name without any surname, as *John* bishop of *P.* 2 *Inst.* 666.

If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter; the mayor or dean need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname. *Id.*

A duke, marquis, earl, viscount, or baron might by the common law be named by his christian name, and by the name of his dignity; as *John* duke of *M.* *Id.*

Additions shall be made] The addition as well as the estate, degree, or mystery, as the town, hamlet, or place, ought by force of this act to be alledged, in the first name; for an addition after the *alias dictus* is ill: As for instance, where the indictment was against *W. R.* otherwise called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not sufficiently named in the first

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first part, the *alias* cannot aid or help it. 2 *Inst.* 669. 3 *Salk.* 20.

Where there are several defendants of different names, and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187.

Where a father hath the same name and the same addition with a defendant being his son, the action is abateable unless it add the addition of *the younger* to the other additions; but where the father is the defendant, it is said that there is no need of the addition of *the elder*. *Id.*

[Of *the estate or degree*] *Esquire* is a good addition. And the eldest sons of peers, in the life-time of their fathers, though frequently titular lords, yet are only esquires. So also the younger sons of peers, and their eldest sons in perpetual succession. Also the eldest sons of knights, and their eldest sons. There are also esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown. 1 *Blackst.* 405.

And it seems clear, that no one can be well described by the addition of a temporal dignity of any other nation besides our own; because no such dignity can give a man an higher title here, than that of an esquire. 2 *Haw.* 187.

Clerk is a good addition of a clergyman; and he that hath taken any degree in either of the universities, may be named by that degree. 2 *Inst.* 668. 1 *Blackst.* 405.

Gentleman and *gentlewoman* are good additions. And as for gentleman, says Sir Thomas Smith, they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called Mr. such a one, and shall be taken for a gentleman. 1 *Black.* 406.

Yeoman is a good addition; under which denomination are comprehended those who have freehold lands of 40 s. a year, and thereby heretofore could serve upon juries, and can yet vote for knights of the shire, and do any other act where the law requires one that is a good and lawful man. *Id.*

Widow, or *singlewoman*, or (as some say) *wife* of such a one, are all of them good additions of the estate or degree of a woman; but no such like addition is good, for the estate and degree of a man. Also *spinster* is a good addition of a woman. 2 *Haw.* 188.

Or

Or mystery] This includeth all lawful arts, trades and occupations, as taylor, merchant, mercer, parish clerk, schoolmaster, husbandman, labourer, and the like. *Id.*

But servant, groom, or farmer, are not additions within this act, because they are not of any mystery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any mystery or occupation. *2 Inst.* 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretick, and such like. *2 Haw.* 188.

If a man hath divers arts, trades or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of gentleman, because it is worthier than the addition of any mystery. And in general a man shall be named by his worthiest title of addition. *2 Inst.* 668, 669.

And of the towns or hamlets] In there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the same county, and none without an addition. But if there be two towns of the same name in a county, without any addition to distinguish them, it may be sufficient in such case to name the defendant generally of either of such towns, without adding any thing to distinguish it from the other. *2 Haw.* 189.

If the defendant live in a hamlet of a town, it is said to be in the election of the party to name him either of the hamlet or of the town. *Id.*

But the addition of a parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good. *2 Inst.* 669.

The addition of the place of habitation of a wife, is sufficiently shewn, by shewing that of the husband; because it shall be intended that the wife lives where the husband does. *2 Haw.* 190.

Or places] If the defendant lives in a place known by a special name, and lying out of any town or hamlet, he may be well named of such place; but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet. *2 Haw.* 189, 190.

Of which they were or be] The addition of the estate, degree, or mystery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of such a degree

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degree or mystery; but it is a good addition to name the defendant *late* of such a town or place, because men do often remove their habitation. 2 *Inst.* 670.

So in the case of lord *Balmerino*, after the rebellion in the year 1745, the indictment charged, that Arthur lord *Balmerino*, *late of the city of Carlisle in the county of Cumberland*, did so and so; lord *Balmerino* objected that this was no title belonging to him; upon which the lord high steward informed him, that these words were not made part of his title, but only an addition of place which the law for good reasons requires to be inserted by way of description of defendants in all indictments, and it is most commonly taken from that place where the crime is by such indictment charged to have been committed. *Lord Balmerino's Trial*, p. 12. *State Trials*, vol. 9.

Shall be void] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for tho' the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 *Inst.* 670.

By the exception of the party] But if the defendant appeareth upon process, and plead, taking no advantage thereof by exception, he hath lost the benefit hereof: but it seemeth that the bare appearance of the party, without plea, doth not save the want of a good addition. 2 *Haw.* 190.

Adultery. See Lewdness.

Affray.

- I. *What is an affray.*
- II. *How far it may be suppressed by a private person.*
- III. *How far by a constable.*
- IV. *How far by a justice of the peace.*
- V. *Punishment of an affray.*

I. *What is an affray.*

AN affray is a public offence to the terror of the king's subjects; so called (according to lord Coke) because it affrighteth and maketh men afraid. 3 *Inst.* 158.

From whence it seemeth clearly to follow, that there may be an *assault*, which will not amount to an *affray*; as where it happens in a private place out of the hearing or seeing of any, except the parties concerned;

in which case it cannot be said to be to the terror of the people. 1 *Haw.* 134.

Also it is said, that no quarrelsome or threatening words whatsoever, shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him, before a justice in order to find sureties. 1 *Haw.* 135.

Also, it is certain, that it is a very high offence to challenge another either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. *Id.*

But altho' no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute: For by 2 *Ed.* 3. c. 3. it is enacted, that *no man of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. And the king's justices in their presence, sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-bolders, constables and wardens of the peace within their wards, shall have power to execute this act. And the judges of assize may punish such offenders as have not done their duty herein.*

Upon a cry made for arms to keep the peace] It is holden upon these words of exception, that no person is within the intention of this statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. 1 *Haw.* 136.

Affray.

In affray of peace] *En effrayer de la pais*; L. Coke has it *pais*, of the country, or the people; and so, he observes; that the writ grounded upon this statute saith, *In quorundam de populo terrorem*; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Inst.* 158.

And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute, by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. 1 *Haw.* 135.

Nor to go nor ride armed] It is holden, that a man cannot excuse the wearing such armour in publick, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault; but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house against those who threaten to do him any violence therein, because a man's house is his castle. *Id.*

Their bodies to prison] The statute of 20 R. 2. c. 1. adds a fine likewise.

Wardens of the peace] It is holden that any justice of the peace, or other person who is impowered to execute this statute, may proceed thereon *ex officio*; and if he find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make a record of the whole proceeding, and certify the same into the exchequer. 1 *Haw.* 135.

II. How far it may be suppressed by a private person.

It seems agreed, that any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable to be carried before a justice, to find sureties for the peace. 1 *Haw.* 136.

And the law doth encourage him hereunto; for if he receive any harm by the affrayers, he shall have his remedy.

medy by law against them; and if the affrayers receive hurt, by the endeavouring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 3 *Inst.* 158.

But if either of the parties be slain, or wounded, or so stricken that he falleth down for dead; in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry; or else for his escape, they shall be fined and imprisoned. *Id.*

III. How far by a constable.

It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which happens in his presence; but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable by fine and imprisonment. 1 *Haw.* 137.

And it is said, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation. But it seems, that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol, till he shall be punished for his offence: And it is said, that he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt: and that all which he can do in such case is to command them under pain of imprisonment to avoid fighting. *Id.*

But he is so far entrusted with a power over all actual affrays, that tho' he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party. *Id.*

And if an affray be in an house, the constable may break open the doors to preserve the peace; and if affrayers

Affray.

fly to an house, and he follow with fresh suit, he may break open the doors to take them. *Id.*

But it is said that a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or listly to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. *Id.*

IV. How far by a justice of the peace.

There is no doubt, but that a justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable are either enabled or required by the law to do: But it is said, that he cannot without a warrant authorize the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. 1 *Haw.* 137.

V. Punishment of an affray.

All affrays in general are punishable by fine and imprisonment. 1 *Haw.* 138.

And they are inquirable in the leet, as common nuisances. 3 *Inst.* 158.

Warrant to apprehend affrayers.

Westmorland. { To the constable of _____

WHEREAS A. I. of _____ yeoman, hath this day made oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that on the _____ day of _____ in the _____ year of the reign of _____ A. O. of _____ yeoman, and B. O. of _____ yeoman, as _____ in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A. I. These are therefore to command you forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other of his said majesty's justices of the peace for the said county, to answer the premises, and to find sureties as well for their personal appearance at the next general quarter sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred

8

ferred

Affray.

21

sworn against them by the said A. I. for the said offence, as also for their keeping the peace in the mean time, towards his said majesty and all his liege people, and especially towards him the said A. I. Hereof sail not, as you will answer the contrary at your peril. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the year ———

Indictment for an affray.

THE jurors for our lord the king, upon their oath present, that A. O. of ——— in the county of ——— taylor, and B. O. of ——— in the said county, blacksmith, with force and arms, on the ——— day of ——— in the ——— year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at ——— aforesaid in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance of divers of the subjects of our said sovereign lord the king then and there being, and to the evil example of all other the subjects of our said sovereign lord the king, and against the peace of our said lord the king, his crown and dignity.

Alehouses.

For matters relating to the *excise* on beer and ale,
see title *Excise*.

- I. Concerning inns and alehouses in general.
- II. Licensing alehouses.
- III. Selling ale without licence.
- IV. Recognizance, and forfeiture thereof.
- V. Offences in brewing of ale.
- VI. Innkeepers obliged to receive guests.
- VII. Soldiers quartered in alehouses.
- VIII. Concerning ale vessels, and the measure of ale.
- IX. Enhancing the price of ale.
- X. Innkeepers suffering tipling or gaming in their houses.
- XI. Persons guilty of tipling.
- XII. Concerning drunkenness.
- XIII. Detaining goods for the reckoning.

Alehouses.

XIV. Goods of a guest stolen out of an inn.

XV. Guests stealing goods.

I. Concerning inns and alehouses in general.

Difference between inns and alehouses.

EVERY inn is not an alehouse, nor every alehouse an inn: but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn.

Licence to erect inns.

It was resolved by all the judges, that any person might erect an inn to lodge travellers, without any licence or allowance for such erection. *Dalt. c. 56. Blackerby, 179.*

Inn indictable.

But it seems to be agreed, that the keeper of an inn may by the common law be indicted and fined, as being guilty of a publick nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. *1 Haw. 225.*

Innkeeper selling ale.

And if an inn useth the trade of an alehouse, as almost all innkeepers do, it shall be within the statutes made about alehouses. *Dalt. 133.*

Inns to be licensed.

It hath been also agreed by law, that innkeepers ought to have licence, and be bound by recognizance for keeping good order, as alehousekeepers are. *Dalt. 24.*

Power of justices by the commission.

By the commission of the peace, two justices (1 *Q.*) may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf made.

II. Licensing alehouses.

By two justices at a general meeting.

By the 5 & 6 *Ed. 6. c. 25.* any two justices, 1 *Q.* might licence alehouses; but now by the 2 *G. 2. c. 28.* and 26 *G. 2. c. 31.* it is enacted, that whereas many inconveniences have arisen from persons being licensed to keep inns and common alehouses, by justices who, living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses, or the characters of the persons applying for licences

licences to keep the same; therefore from henceforth no licence shall be granted to any person to keep a common inn or alehouse, but at a general meeting of the justices acting in the division where the said person dwells, to be holden for that purpose, on the first day of *September* yearly, or within twenty days after, and not at any other time. Excepting that this shall not alter the power or the time of granting licences, in cities and towns corporate. 2 G. 2. c. 28. s. 11, 12. 26 G. 2. c. 31. s. 4. 16.

To keep a common inn or alehouse] In the case of *Parker and Flint, M. 10 W.* it was determined, that houses at *Epsom*, where they take in lodgers and boarders, coming to drink the waters there during the season, and dress victuals, and sell them ale and beer, and entertain their horses at 8d a day, but sell to no other persons; are not inns nor alehouses within the meaning of these acts. 12 Mod. 254.

Houses which take in lodgers only, need not be licensed.

At a general meeting of the justices holden for the division] But it is not necessary to set forth specially in the licence, that it was granted at a general meeting of the justices holden for the division; and therefore a conviction for keeping an alehouse without such licence, is not good upon the evidence of the licence only, but there must be other evidence. *M. 11 G. 2. King and Bryan. 2 Sess. Ca. 183. Andr. 81.*

What justices shall be deemed of the division.

M. 12 G. 3. K. v. Sir J. P. Price Bart. The defendant had convicted a woman of selling ale in *New Town, Montgomeryshire*, without a licence. In fact she had a licence, granted by two justices (both of them living *out of the division*, one of them till this occasion never acting there, and the other only occasionally and in very few instances), at a meeting which the defendant and another justice of the division had appointed; but at which neither of them attended. The two justices who came for that purpose, proceeded to business without the justices of the division, and granted licences to this woman and some others. Previous to the conviction, the defendant consulted *Sir Fletcher Norton* upon the case; who being of opinion that the licence was void, not having been granted by two justices acting in the division, advised the conviction. She applied to the court for an information, which was granted, and the defendant was convicted at *Sherbury* assizes 1771, before *Leigh* Serjt. judge of assize. At the trial there was some evidence of ill-will from the defendant towards the woman; and the opinion of *Sir*

Alehouses.

F. Norton was given in evidence for the defendant.—*Beacroft* moved for a new trial on two grounds; first, that the defendant having taken the opinion of counsel, under whose advice he had proceeded, could not be said to have acted maliciously; and if erroneously only, could not be criminal. And secondly, that he had acted legally, the licence being absolutely void, not having been granted by two justices acting in the division. The serjeant who tried the cause, reported against him upon the first ground, and that there was evidence of malice; and the court thought the licence granted by the justices, tho' not those who generally acted for that division, was legal; for *per Aston J.* Any justice of the county, going to the meeting in the division, is for that purpose a justice of the division. *Col. Caf.* 305.

Cities and towns
corporate,

Excepting, that this shall not alter the power or the time of granting licences in cities and towns corporate] In the case of *K. v. Downs* and another, *H.* 30 G. 3. it was adjudged, that the above exception does not exempt such places from the operation of the other parts of the act; but magistrates in such districts must grant licences at a publick meeting, and give the like notice of their meeting to grant licences, as justices of a county give. *Durnf. and East*, 3 V. 560.

The meeting
how to be ascer-
tained,

And the day and place for granting licences shall be appointed by two or more justices for the division, by warrant (A) under their hands and seals, at least ten days before such meeting directed to the high constables, requiring them to order (B) their petty constables, or other peace officers, to give notice to the several innkeepers and alehousekeepers within their respective constablewicks, of the day and place of such meeting. And all licences granted at any other time and place shall be void. 26 G. 2. c. 31. s. 4.

Certificate of
persons to be li-
censed.

And no licence shall be granted to any person not licensed the year preceding (except in cities or towns corporate) unless he produce a certificate (C) under the hands of the minister and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders of the place, setting forth that such person is of good fame and of sober life and conversation; and it shall be mentioned in such licence that such certificate was produced, otherwise the licence shall be void. 26 G. 2. c. 31. s. 2. 16.

Except in cities and towns corporate] In cities and towns corporate, such certificate is supposed not to be necessary, by reason of the propinquity of the persons to be licensed.

Unless

Unless he produce a certificate under the hands of the minister and major part of the churchwardens and overseers; or else of three or four reputable and substantial householders of the place] In the case of *K. v. Young and Pitts*. E. 31 G. 2. The court said, that a certificate being signed by three or four reputable and substantial householders, without the minister and churchwardens, &c. was sufficient. *Burr. Mansf.* 556.

Nevertheless, altho' a certificate in such places is not requisite by this act, yet it is discretionary in the justices whom they will licence, and a *mandamus* in such case will not lie to compel the justices to license any person; and on a conviction for selling without licence, the want of such licence can only come in question, and not the reason why it was denied. *Strange* 881.

Whether a *mandamus* will lie to compel the justices to grant a licence.

So in the case of the *King* against the justices of *Worcester*, M. 4 G. 2. a *mandamus* was moved for to be directed to them, to grant a licence to a victualler to sell ale. Affidavits were offered to be produced, of the justices declaring that they would grant no licences, to any of the inhabitants who signed a petition to the parliament for erecting a workhouse there; and that the person, on whose behalf the motion was now made, had been a victualler in the town for above thirty-five years. The court said, that they never knew a motion of this sort granted; but if there was such a grievance, as is mentioned, another sort of motion would be more proper. *1 Barnardist.* 402.

In the case of the *King* against *Young and Pitts*. E. 31 G. 2. a motion was made for an information against these two justices, for arbitrarily, obstinately, and unreasonably refusing to grant a licence to one *Henry Day* to keep an inn at *Eversey, Wilts*. On shewing cause, it was insisted, that the legislature has made the justices the sole judges; as being such who, from the residence on the spot, must best know the persons and their characters, and the circumstances of the place. And the legislature has even excluded the justices of other divisions. And the justices thus intrusted have a right to judge for themselves. No man can judge for another. And this power is intrusted to them by the constitution, by the legislature. It may be very dangerous to them to be obliged to give their reasons publicly; though they may have very sufficient ones to satisfy their own minds, and to direct their own judgments. And if they are thus intrusted, why are they liable to be called to an account by any other jurisdiction, unless they act faultily and wilfully wrong?

Whether an information will lie, for refusing to grant a licence.

wrong? Indeed, if they do wilfully wrong let them be punished; but where they act conscientiously, they are not accountable to any body. By *L. Mansfield Ch. J.* It is certain, this court has no power or claim, to review the reasons of justices of the peace, upon which they form their judgments in granting licences, by way of appeal from their judgments, or over-ruling the discretion intrusted to them. But if it clearly appears, that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them; they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross and injurious. If their judgment is wrong, yet their heart and intention pure, God forbid that they should be punished. And he declared that he should always lean towards favouring them; unless, partiality, corruption, or malice shall clearly appear. And having gone through all the particulars both of the charge and of the defence, he concluded with declaring it as his opinion, that there was no sufficient ground for a criminal charge against these justices. And by the court unanimously, the rule was discharged with costs. *Burr. Mansf. 556.*

M. 32 G. 2. K. and Albay. On shewing cause why a rule should not be made absolute, for an information against a justice, for a misdemeanor in refusing to grant a licence to one *Francis Simas* (who had been licensed for several preceding years) to sell ale, as usual; and afterwards convicting him, without any previous summons, for having sold it without a licence: it appeared, that the pretended grounds upon which this rule had been applied for and obtained, were either false or fallacious. The first was, that the only reason why the licence was refused him was, his declining to pay a sum of money (*viz.* 5*l.*), which was claimed of him upon a distinct and collateral account, and which he denied to be due from him; the payment of which sum of money was (as he alledged) insisted upon by the justice, as a condition precedent to his granting the man a licence. The second pretended ground of the motion was, that the justice had convicted him of the offence, without any previous summons.—As to the first: The court were unanimous, that the allegation appeared to be false in fact; but, at the same time, they declared explicitly, that the justices have no sort of authority, to annex any such conditions to the grant of these licences. As to the second: They esteemed it to be fallacious, as the fact came out upon shewing cause; for the man

man was actually present before the justice (who had sent for him), and was so far from offering at making any defence, that he seemed rather to apply for mercy; declaring, however, that if the justice did convict him, he would not pay the penalty. Thirdly, the court observed, that the man had not any where alledged, that he was innocent of the offence; which they thought it incumbent upon him to have done, to entitle himself to make this application against the justice.—And the rule to shew cause was discharged. *Burr. Mansf.* 653.

E. 2 G. 3. K. v. Williams and Davis. An information was granted against the defendants, as justices of the peace for the borough of *Penryn*, for refusing to grant licences to those alehousekeepers who voted against their recommendation of candidates for members of parliament for that borough. It appeared, that they had acted very grossly in this matter; having previously threatened to ruin these people, by not granting them licences, in case they should vote against those candidates whose interest these justices themselves espoused; and afterwards actually refusing them licences, upon this account only. And *L. Mansfield* declared, that the court granted this information against the justices, not for the mere refusing to grant the licences (which they had a discretion to grant or refuse, as they should see to be right and proper); but for the corrupt motive of such refusal, for their oppressive and unjust refusing to grant them, because the persons applying for them would not give their votes for members of parliament as the justices would have had them. *Burr. Mansf.* 1317.

T. 5 G. 3. K. v. Hann and Price, justices of the peace for the borough of *Corfe Castle*. On shewing cause against an information which had been prayed for against them, for a misdemeanor in the execution of their office, in refusing to grant a licence to sell ale to one *Ingram*, an innkeeper in that borough, merely from a motive of resentment against him, for having espoused an opposite interest in the election for members of that borough; the defence was, that they did not act from any resentment or corrupt motive, but solely because *Ingram* was an improper person, and had kept a disorderly house, and continued to keep it after full notice to the contrary, and in particular, that he encouraged gaming and cock-fighting at his house. By *L. Mansfield Ch. J.* The court should never interpose against magistrates, unless they have acted from bad motives and *mala fide*; especially in such a case as this, where they are intrusted with an absolute discretion:

sion: but for that very reason, this is the strongest case for the interposition of the court, if it appears that they have acted upon corrupt motives. If it did appear clearly that this man kept a disorderly house, it would be a reason against the court's interposing against the justices. But this does not clearly appear. And upon the whole he thought, on a full discussion of the affidavits, that the charge upon the justices was not satisfactorily answered by them. And he declared it to be of very dangerous consequence to permit the due discretion of the justices to be influenced by considerations of this kind. The court thought it a proper case for an information, and made the rule absolute.

Afterwards, *M. 6 G. 3.* the justices confessing themselves guilty of the information, it was moved for a rule to dispense with their personal appearance, on the undertaking of their clerk in court to answer for their fines. But the court upon full debate were unanimous in refusing the motion. The general doctrine laid down by the court was, that though such a motion was subject to the discretion of the court, either to grant or refuse it, where it was clear and certain that the punishment would not be corporal; yet it ought to be denied in every case where it was either probable or possible that the punishment would be corporal. And this, for the example sake; as the notoriety of their being called up might deter others from the like offences. And finally, upon their appearance in court, the sentence was, that they should be committed for a month, fined 50l each, and imprisoned till the fine be paid. *Burr. Mansf. 1716, 1786.*

An information
will be granted
for improperly
granting an ale
licence.

E. 27 G. 3. K. v. Holland and Forster. An information had been moved for against the defendants, who were justices for *Middlesex*, for improperly granting an ale licence to one *Harrison*, who had been refused one by the justices, at their last general meeting, on account of misbehaviour. It appeared that the defendant *Forster* had been present at that general meeting, at the time when the licence was refused; but he had afterwards told the other defendant *Holland*, who was not present at the general meeting, that the only reason why a licence had not been granted then, was, that they might have an opportunity of enquiring into the character of *Harrison*, and had accordingly prevailed upon *Holland*, at a private meeting held by those two only, to join in granting a licence.—The court were clearly of opinion, that an information should be granted against a justice, as well for granting a licence improperly, as for refusing one in the same manner. That
it

it had already been done in the case of *K. v. Filwood*; and indeed the mischief of granting a licence improperly, was infinitely greater than that of refusing one; for in the former case it might be productive of injury to the whole community, while in the latter the grievance was felt only by the individual. That the only ground of these applications was the improper conduct of the magistrates. But as it appeared in this case that *Holland*, tho' not altogether blameless, had been deceived by *Ferster*, they discharged the rule as to the former, upon his paying the costs of the application as against himself; and as to *Ferster*, they granted the information. *Durnf. and East*, 1 V. 692.

By the 26 G. 2. c. 13. No justice of the peace, being a common brewer of ale or beer, innkeeper, or distiller, or a seller of or dealer in ale or spirituous liquors, or interested in any of the said trades, or being a victualler or maltster, shall be capable, or have any power to grant licences for selling ale or beer or any other liquors, but the same shall be void. s. 11.

What justices are prohibited from granting licences.

And all mayors, town clerks, and other persons whom it may concern shall make out ale licences (D) duly stamped, before the recognizance be taken; on pain of 10l, half to the king, and half to the prosecutor, with costs. 6 G. c. 21. s. 56. 1 Ann. stat. 2. c. 22. s. 6. Which stamp duty by 9 Ann. £. s. d. £. s. d. c. 23. shall be ——— 0 1 0 And more by 29 G. 2. c. 12. 1 0 0 Ditto 24 G. 3. c. 30. 0 10 6

Stamp.

And if any person shall write any licence without such stamp, he shall forfeit 10l with costs, to be recovered as stamp penalties; and the licence shall not be available till the duty shall be paid, and also a penalty of 5l. 29 G. 2. c. 12. s. 20.

And the justices clerk shall have 2s 6d, and no more, for such licence. 9 G. 2. c. 23. s. 14. 24 G. 2. c. 40. s. 28, 29.

Justices clerks fee.

And to prevent frauds therein, every victualler or ale-housekeeper shall, on demand by any officer of the stamp duties, produce his licence, and permit him at his own expence to have a copy thereof; on pain of 40s. 5 G. 3. c. 46. s. 20.

Licence to be produced to the officers of the stamp duties.

And every clerk of the peace, town clerk, common clerk, or person acting as such, shall on demand by any officer of the stamp duties, or within three days next after, deliver to such officer, a true list of the names and places of

A list of ale-housekeepers to be delivered to the officers of the stamp duties.

Alehouses.

of abode of all the victuallers, alehousekeepers, and other persons then licensed to sell ale or beer, or other excisable liquors, by retail, within the respective districts; and on delivery thereof, such officer shall pay to him after the rate of one farthing for every licensed person inserted in the list: And if he shall refuse or neglect to deliver such list, or not insert therein a full and true account; he shall forfeit 5*l.* *f.* 21.

Licence restrained to the place.

But no licence shall intitle any person to keep an alehouse in any other place than that in which it was first kept by virtue of such licence; and such licence with regard to all other places shall be void. 26 *Geo.* 2. *c.* 31. *f.* 3.

How long to continue.

And all licences granted at the general licensing day shall be made for one year only, to commence on the 29th day of *September.* *f.* 4.

Licensed person dying or removing,

And by 32 *G.* 3. *c.* 59. so much of the said act of 26 *Geo.* 2. *c.* 31. and of the 29 *Geo.* 2. *c.* 12. as relates to any licensed person dying or removing; or to the empowering his executors, administrators, or assigns, or the occupier of such licensed house, to continue during the residue of the term without any new licence or certificate; are repealed. And after 31st *July* 1792, if any such licensed person shall die before the expiration of his licence; or if he, or his executors, administrators, or assigns, shall remove from such licensed house, and shall assign such licence; or in case any such house *shall become empty or unoccupied*, the late occupier whereof was duly licensed the year preceding; then (except as herein ~~is~~ otherwise provided) two justices, at a petty sessions holden in and for the division where such house is situate, may grant a licence to the executors, administrators, or assigns of the person so dying, who shall be possessed of such house, or to any new tenant or occupier, upon such removal, or the house becoming empty or unoccupied as aforesaid; to open, or continue open such house as an alehouse until the next general licensing day, so as such licence be stamped as before directed. Or the said justices, in their discretion, may allow such executors or administrators, or other persons aforesaid, possessed of any such licence, to continue open such house for the purpose aforesaid, under and by virtue of such licence, until the expiration thereof; every such executor, administrator, or assign, and every such tenant or occupier respectively, obtaining within thirty days after such death or removal, or entering upon the possession of such house, and producing to the said justices such certificate, and entering

or the house becoming empty or unoccupied.

tering personally into such recognizance, with such Sureties as is directed by the said act of 26 G. 2. Which certificate and recognizance, with the condition thereof, attested by such justices, shall forthwith, or at the next sessions at farthest after granting such licence, be sent to the clerk of the peace, to be filed amongst the records of the sessions. *f. 1.*

Shall become empty or unoccupied] That is, as it seemeth, by the removal of the former tenant; for in many places the tenants change their habitations, not in *September* when the licence is required to be granted, but at some future time, as at *May-day*, or *Whitsuntide*. In this case, where the tenant, intending to remove, hath not taken out a licence for that year, his successor may obtain a licence until the next general licensing day by applying to two justices at a petty sessions, and making it appear to them by certificate that he is a person fit to receive a licence, and also making it appear that the house is proper to be licensed, whereof the proof must be by its having been licensed the year next before.

But nothing in this act shall extend to the granting any new licence to any house, the occupier whereof was not duly licensed the year preceding. Nor to alter the time of granting licences. Nor to oblige persons not licensed the year preceding to produce certificates in the city of *London*. 32 G. 3. c. 59. *f. 4, 5.*

Not to extend to houses not licensed the year preceding, nor to alter the time of granting licences, &c.

And every person entering into any such licensed house, who shall sell beer, ale, or other exciseable liquors, unless authorized by the justices at the petty sessions next ensuing after the expiration of such thirty days in manner aforesaid; shall be liable to all the penalties, punishments, and forfeitures, of persons selling ale without licence. *f. 6.*

Penalty.

But every person who shall have obtained such certificate as aforesaid, shall be indemnified for selling beer, ale, or other exciseable liquors, till after such petty sessions shall have been held. *f. 7.*

Persons obtaining such certificate, indemnified till the petty sessions.

And the clerk of the peace, upon the continuance of, or granting a new licence as aforesaid, shall record the same, for which he shall be paid 1s. *f. 8.*

Record to be made.

And within *Middlesex* and *Surry*, the justices at the general licensing meetings shall appoint not less than six, nor more than eight special days of meeting yearly, at different equal periods, as near as may be next ensuing such general meeting; and shall cause due notice to be given of the times and places of such special meetings; at which

Middlesex and Surry.

meetings two justices of the division may grant to the executors, administrators, or assigns of such licensed persons, or the person coming into any house which hath become empty or unoccupied as aforesaid; a licence to such new tenant or occupier (on his producing a certificate, and entering into a recognizance as aforesaid); or in their discretion may allow a continuance of any licence before granted in manner aforesaid; until the next general licensing day. *f. 2, 3.*

Persons licensed to sell spirits must be first licensed to sell ale.

No person shall retail any distilled spirituous liquors, or strong waters, without a licence from the officers of excise, taken out ten days before he shall begin. And such person shall be first licensed to sell ale or spirituous liquors; by two justices of the peace. 2 G. 2. c. 28. *f. 11.* 9 G. 2. c. 23. *f. 14.* 16 G. 2. c. 8. *f. 8, 11.* 24 G. 2. c. 40. *f. 9.* 29 G. 2. c. 12. *f. 22.*

[Note, here is a *double* licence required for retailing of spirituous liquors; first, a licence from the justices to sell ale or *spirituous liquors*; and then a licence by the officers of excise to sell spirituous liquors. And therefore the ale licence ought to run so as to include spirituous liquors, or else the law should be altered in this particular. The printed alehouse licences from the stamp office endeavour to preserve the jurisdictions distinct, by excepting the several kinds of spirituous liquors by name; out of the licence by the justices. But this is against the statutes; nor was it intended perhaps by the legislature, that the officers of excise should have the sole jurisdiction in this matter, but rather that the primary judgment concerning the same should be referred to the justices.]

Which licence for retailing spirituous liquors is treated of at large under title *Excise, Spirituous Liquors.*

Wine Licence. See *Excise, Wine.*

Licence for Made Wines. See *Excise, Sweets.*

III. Selling ale without a licence.

Former penalties repealed.

New penalties inflicted.

By 35 G. 3. c. 113. so much of 5 G. 3. c. 46. as relates to the penalties for selling ale without licence is repealed, and other penalties are inflicted in lieu thereof, as follows: After the 20th Sept. 1795, every person who shall sell, or suffer to be sold, ale or beer, or any other exciseable liquors, by retail, without being duly licensed, and shall be convicted thereof, shall forfeit 20 l. and also the costs and expences attending the conviction; and for a second offence shall moreover be rendered incapable of being afterwards licensed to keep

an alehouse, or to sell ale, beer, or other exciseable liquors, by retail. *f. 1.*

And one justice may hear and determine the same in a summary way, who, upon information (E) exhibited, or complaint made to him, may summon (G) the party accused, and also the witnesses on either side; and upon appearance, or contempt by not appearing, shall proceed to hear the matter, and examine the witnesses on oath, and to give judgment therein; and upon confession, or oath of one witness, may convict (H) the party accused, and if he be then present, (or if absent,) within three days after notice (I) either personally, or left for him at the place where the offence was committed, shall not pay the said penalty, together with the costs, to be ascertained by such justice; the same shall be levied by distress (K) of the goods and chattels of such offender wheresoever found within the jurisdiction of such justice, or in any entered place of such offender, in the like manner as directed by 27 G. 2. c. 20. & 33 G. 3. c. 55. (a) as far as the same relate to executing warrants of distress, as fully as if the powers in the said acts had been repeated herein: and shall be applied half to the informer and half to the poor, in such manner as such justice shall direct; and if a return shall be made that sufficient distress cannot be found whereon to levy such penalty and costs, any justice of the county or place where such offence was committed, upon producing to him such warrant and return, or (if such justice shall be of any other county or place, then upon oath made of the hand writing of the justice granting such warrant, and of the truth of such return) may commit (L) such offender to the common gaol or other prison within his jurisdiction, for any term not exceeding six nor less than three calendar months, unless such penalty and costs be sooner paid. *f. 2. 5.*

Penalties how to be recovered and applied.

Provided, that on the request of the owner, such distress may be sold within the four days allowed by the said act of 27 G. 3. *f. 3.*

Distress may be sold within four days, on request.

And there shall be allowed to the officer executing such warrant of distress, for the safe keeping of the goods distrained, any sum not exceeding 5 s. *per* day, and for every assistant not exceeding 2 s. *per* day for each, as such justice shall direct, on proof on oath that there was sufficient cause for calling in such assistance. *f. 4.*

Allowance to persons executing warrants, &c.

And whereas many persons carry on the trade of alehouse keepers and victuallers, and retailers of beer and ale, without licence, and make entry of places for keeping

What shall be deemed legal notice to persons summoned.

(a) See 27 G. 2. c. 20. and 33 G. 3. c. 55. post. title *Distress by warrant of justice of peace.*

the same, by feigned names, and such beer and ale is frequently retailed in houses and places detached from their place of residence, whereby the law hath been evaded; it is enacted, that where any summons shall be issued, for any person to appear to answer to any complaint for selling by retail any beer, ale, or other exciseable liquor, without licence, the direction of such summons to such person by the name he made such entry, or is usually known, whether the same be his real name or not, and leaving such summons at such house or place where such offence was committed, and affixing a copy thereof on the door or other conspicuous part on the outside thereof, (the same being proved on the oath of the person who served or affixed up such summons,) shall be deemed a sufficient notice or summons to all intents and purposes. *f. 6.*

Retailers to
make entry, on
penalty of 50*l.*

And every alehouse-keeper, victualler, or retailer of beer or ale, who shall have, or receive into his custody or power, any beer or ale to sell by retail, shall, three days at least before he begin to sell or dispose thereof, make entry in writing at the next excise office, of every house, out-house, cellar, vault, room, storehouse, or other place to be used for keeping or selling the same; which said entry shall set forth his true name, and whether he be an alehouse-keeper, victualler, or retailer; and such person shall be deemed the occupier and proprietor of every such place, so long as such entry shall remain in force; on pain of forfeiting 50*l.* to be recovered, levied, mitigated and distributed as by the laws of excise; and every such storehouse, cellar, room, or place so used without being so entered, shall be deemed private and concealed places, within the meaning of this and every other act. *f. 7.*

Goods found
where any of-
fence is com-
mitted liable to
distress.

And all exciseable liquors and other goods and chattels found in any house or place where any such offence shall have been committed, or in any place belonging thereto or occupied therewith, or which hath been entered as aforesaid, by whom, or by what title soever such goods shall be claimed, shall be liable to such distress in like manner as if such offender had been the real owner. *f. 8.*

Who shall be
deemed retailers.

Excise officers
may be summon-
ed to produce
entries and stock
books,

And every person who shall make such entry as aforesaid, shall be deemed a seller by retail; and any justice may summon before him, or before any other justice, any entry keeper, gauger, or other excise officer; having the custody of entries, who shall, when required, produce every entry made within his division, and also his stock book and other account of survey, and any such justice may examine on oath any such officer respecting such entry, or respecting the stock of any such person; and if it shall appear that any person hath made entry as aforesaid, or is surveyed

as an alehouse-keeper, victualler, or retailer, and has not received, or is not entitled to the abatement allowed to common brewers, then such justice may summon such person to produce his licence to sell beer and ale, and if he shall not at the return of such summons appear, or appearing shall not produce his licence, such justice (on proof of due service of such summons if such person shall not appear) may adjudge him guilty of selling beer or ale by retail without licence. *f. 9.*

and retailers to
produce licences.

And if any person shall be summoned as a witness, and shall neglect or refuse to appear at the time and place appointed, without a reasonable excuse (to be allowed by such justice,) or appearing shall refuse to be examined on oath and give evidence, he shall forfeit 10l. to be levied by distress, to be applied to the poor where such offence was committed in such manner as such justice shall direct; and for want of sufficient distress, such offender shall be committed to the common gaol or other prison, for any term not exceeding six calendar months, unless such penalty shall be sooner paid. *f. 10.*

Witnesses not
appearing for-
feit 10l.

And if any person, after service of any summons to appear to any charge of selling ale or beer, or other exciseable liquors, without a licence, shall convey away any goods or chattels herein before made liable to distress, from the house or place wherein such offence shall have been committed, or belonging thereto or occupied therewith, or which hath been entered as aforesaid; it shall be lawful for the officer to whom such warrant is directed, or other person acting in his aid, within 30 days after such conveying away, to seize the same wherever they may be found, and dispose of them in such manner as if they had been distrained on the premises. And if carried out of the jurisdiction of such justice, any justice of the county, city, liberty, or place into which the same shall be so conveyed, is required, on proof on oath of the hand-writing of such justice originally signing such warrant, to indorse his name on the back thereof, which shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, to execute the same, and to proceed in such manner as if such goods had been seized within the jurisdiction of the justice who signed the original warrant. *f. 11.*

Goods conveyed
away may be di-
strained within
30 days where-
ever found.

Warrants may
be indorsed.

And if any person shall think himself aggrieved by the judgment of such justice, he may appeal against any such conviction to the next sessions, (and such justice shall make known the same to such person at the time of such conviction,) unless such sessions be holden within six days next after such conviction, and in such case to the next subse-

Appeal.

quent sessions and not afterwards, such person, at the time of such conviction, giving to such justice notice in writing of his intention to appeal, and also giving security, to the satisfaction of such justice, for the payment of the penalty and costs in case such judgment be affirmed; and also further entering into a recognizance at the time of such notice, with sufficient sureties, to try the appeal, abide the judgment, and pay such costs as shall be awarded at such sessions. And the judgment of such sessions shall be final and conclusive to all intents and purposes whatsoever; and if such sessions shall adjudge such appeal to be frivolous or vexatious, they may give costs to the party aggrieved by such appeal, not exceeding 5*l.* in the whole. *f. 12.*

Conviction.

And the conviction shall be in the form or to the effect expressed in 26 *G. 2. c. 31. mutatis mutandis* as the case may be, and shall be good without stating the case, or facts or evidence, in any more particular manner (*H*), and shall be certified to the next sessions to be filed among the records. *f. 13.*

Penalties may be mitigated for the first offence.

Provided, that where it shall be proved to the satisfaction of such justice, that such offender hath not been before convicted of any offence against this act, such justice may mitigate any penalty hereby imposed, in case of such first offence, but not otherwise, and not to less than 10*l.* *f. 14.*

Inhabitants may be witnesses.

And any inhabitant of any parish, township, or place in which any such offence shall be committed, shall be deemed a competent witness notwithstanding. *f. 15.*

Prosecutions to be in 6 months.

Provided always, that all penalties within this act, shall be sued for and determined within six months after the offence is committed. *f. 16.*

Persons suspected of selling ale without a licence.

Also where any justice shall suspect that any person sells without licence, he may call such person before him, and also any excise officer or gauger to produce his stock book or other account of the charge or survey of such suspected person, and may examine such officer on oath in what manner he charges such person, and how such person pays the duties; and if it shall appear by such stock book or account, or oath of the officer, that such person is surveyed as a victualler or retailer, and is charged with the same duties that victuallers and retailers are charged with and pay for any the liquors aforesaid, and is not intitled to the allowance or abatement given to common brewers, he shall be deemed an alehousekeeper, victualler, retailer, or seller thereof. 26 *Geo. 2. c. 31. f. 9.*

Selling in fairs.

The clause excepting *fairs*, in the several acts, is from the necessity of the thing, respecting the accommodation of persons resorting thither. But those who shall brew such

such ale or beer, to be sold by them in fairs, must take care to give notice to the gaugers, that the same may be surveyed; for tho' they are exempted from taking licence, yet they must nevertheless pay the duties of excise. And this indulgence seemeth to be intended only in the place where the common fair is held; and not in any private house, which may be within the limits of the town where such fair shall be kept, especially wherein there are licensed alehouses sufficient.

And by 35 G. 3. c. 113. Nothing therein shall extend to prohibit any person from selling ale or beer in booths or other places at the time and place of holding any lawful and accustomed fair, in like manner as they were before authorized to do. *f. 17.*

BY the statute of the 4 J. c. 4. If any person shall sell or deliver any beer or ale, to any person that shall then sell beer or ale as a common tipler or alehousekeeper, the same person not having licence to sell ale or beer (except it be for the use of his household only); he shall forfeit for every barrel 6s. 8 d. and so proportionably for other quantities; half to the poor, and half to him that shall sue in sessions, by action of debt, information, indictment, or presentment.

IV. Recognizance, and forfeiture thereof.

On granting licences for keeping any common ale-
house or tippling house, the persons licensed shall enter into a recognizance in 10 l. with two sureties in 5 l. each, or one surety in 10 l. (E) as well against the using of unlawful games as also for the using and maintenance of good order and rule to be had and used within the same, as by their discretion shall be thought necessary and convenient; and if such person shall be hindred thro' sickness or infirmity, or other reasonable cause to be allowed by the justices, to attend in person, they may grant the licence, on two sureties entering into such recognizance in 10 l. each. 5 & 6 Ed. 6. c. 25. *f. 1.* 26 G. 2. c. 31. *f. 1.* Recognizance.

As by their discretion shall be thought necessary and convenient Mr. Dalton observes upon these words in the statute of 5 & 6 Ed. 6. that the matter of the condition of the recognizance is by the statute partly referred to the discretion of the justices. And he says, in some shires the justices have agreed upon certain articles framed by their discretion, and generally to be propounded to all common ale sellers; taking their bond for performance of the same: a copy

whereof they used to deliver to every of them ; which manner (he says) had been allowed.

And amongst articles of this kind, he recommends to the justices care these three, especially. 1. That no alehousekeeper, upon the Lord's day, should receive or suffer to remain any persons whatsoever, as their guests, in any their houses or other places, to tipple, eat or drink ; other than travellers, and such as come upon necessary business. 2. That they suffer no person whatsoever, resorting to their houses only to eat and drink, to remain there after the hour of nine in the evening in winter, and ten in summer. 3. That they suffer no person, resorting to their houses only to eat and drink, to remain tippling there above one hour, other than travellers. *Dalt. c. 176.*

To be filed at the sessions.

Which said recognizance, with the condition thereof, fairly written or printed, shall forthwith, or at the next sessions at farthest, be sent or returned to the clerk of the peace, under the hands of the justices, to be by him entered or filed among the records. *26 G. 2. c. 31. f. 1.*

Penalty for licensing otherwife.

And for every licence granted, without taking such recognizance ; and for every such recognizance taken, and not sent or returned ; every justice signing such licence, shall forfeit 3*l.* 6*s.* 8*d.* *5 & 6 Ed. 6. c. 25. f. 2. 26 G. 2. c. 31. f. 1.*

Which said forfeiture, for granting licences, without taking recognizances, shall be to him who shall sue, together with costs. *26 G. 2. c. 31. f. 6.* But it is not said who shall have the penalty for not returning the recognizance to the clerk of the peace, therefore that shall go to the king.

Recognizances to be calendred.

And the clerk of the peace shall keep a register or calendar of all such recognizances, and shall deliver to the justices, at the meeting for granting licences, a true copy of such register or calendar. *26 G. 2. c. 31. f. 5.*

Fee for the recognizance.

And for every recognizance shall be paid by the clerks of the justices taking such recognizances, to the clerk of the peace, for filing or recording the same, and for making and delivering the copies of the register or calendar 1*s.* ; which shall be paid to the clerks of the said justices, by the persons licensed, over and above the fees payable to the said justices clerks. *Id.*

Process on the recognizance.

By the *5 & 6 Ed. 6. c. 25. f. 3.* The justices shall have power, in their quarter-sessions, by presentment, information or otherwise by their discretion, to inquire of all such persons as shall be admitted and allowed to keep any alehouse or tippling house, and that be so bound by recognizance, if they have done any act whereby they have

have forfeited the same recognizance, and they shall upon such presentment or information award process against every such person so presented or complained upon before them, to shew why he should not forfeit his recognizance; and shall have power to hear and determine the same, by all such ways and means, as by their discretion shall be thought good.

And by the 26 G. 2. c. 31. Any justice on complaint or information that such licensed person hath committed any act, whereby in the judgment of such justice the recognizance may be forfeited, or the condition broken, may by summons under hand and seal require such person, to appear at the general or quarter sessions, then and there to answer to the matter of such complaint or information; and also may bind the complainant, or any other person, in a recognizance to appear and give evidence; and the sessions may direct the jury which shall there attend for the trial of traverses, or some other jury of twelve honest and substantial men, to be then and there impanelled by the sheriff without fee, to inquire thereof; and if the jury find that such person hath done any act whereby the recognizance is broken, such act being specified in such complaint or information, the court may adjudge him guilty; which verdict and adjudication shall be final; and thereupon the court shall order the recognizance to be estreated into the exchequer, to be levied to his majesty's use; and the said person shall be disabled to sell any ale, beer, cyder, perry, or spirituous liquors for three years, and any licence granted to him for such term shall be void. Provided, that the justices, at the request of the prosecutor, or of the party complained of, or either of his sureties, may adjourn the trial to the then next sessions. *f. 7, 8.*

And if any person shall be disabled, by conviction, to sell ale, beer, cyder or perry; he shall by the same conviction be disabled to sell any spirituous liquors, any licence before obtained for that purpose notwithstanding; and every licence granted to him for selling ale, beer, cyder, perry, or spirituous liquors, shall be void; and if he shall sell during such disability, he shall be punished as for selling without licence; and a certificate from the clerk of the peace (which he shall grant without fee) of such conviction shall be legal evidence. *Id. f. 11.*

Spirit licence is void on conviction of selling ale without a licence.

Which conviction shall be in this or the like form :

Middlesex. **A.** *O. is convicted on his own confession, (or on the oath of ———) of having sold ale, beer, or other liquors, in the parish of ——— in this county, on the ——— day of ——— after being disabled to sell the same. This is the first, second, or third conviction. Given under my hand and seal this ——— day of ———*

Which said conviction shall be certified to the next sessions, to be filed amongst the records. *f. 13.*

V. Offences in brewing of ale.

By the 1 *W. sess. 1. c. 24. f. 17.* No common brewer or retailer of beer or ale, shall use in the brewing or working thereof any melasses, coarse sugar, honey, or composition or extract of sugar; on pain of forfeiting the liquor, and also 100 l. half to the king, and half to him that shall sue in six months.

And by the 10 & 11 *W. c. 21. f. 34.* If any common brewer or retailer of beer or ale, shall use any melasses, coarse sugar, honey or composition or extract of sugar, in the brewing, making, to working of any ale or beer; or if any common brewer shall receive into his custody any quantity of any of the said materials exceeding ten pounds, he shall forfeit 100 l. to be recovered and mitigated as by the laws of excise; and the servant or other assisting therein, shall forfeit 20 l. in like manner, and in default of payment shall be imprisoned three months.

And by 9 *Ann. c. 12.* No common brewer, innkeeper, or victualler, shall use any broom, wormwood, or any other bitter ingredient (to serve instead of hops) in any beer or ale for sale (except infusing the same, after it is brewed and tunned, to make broom or wormwood ale or beer); on pain of 20 l. half to the king, and half to the prosecutor, to be levied as by the laws of excise. *f. 24, 26.*

And by 12 *Ann. stat. 1. c. 2.* No common brewer or retailer of beer or ale, shall use any sugar, honey, foreign grains, guinea pepper, essentia bine, coculus indiae, or any unwholesome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20 l. to be recovered and mitigated as by the laws of excise, half to the king, and half to him that shall sue. *f. 32.*

VI. Innkeepers obliged to receive guests.

If one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same; he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king. 1 Haw. 225.

Also it is said, that he may be compelled by the constable of the town, or by a justice of the peace, to receive and entertain such a person as his guest; and that it is no way material whether he hath a sign before his door or not, if he make it his common business to entertain passengers. But how the officer may compel him may be a question. It seemeth that all the officer can do, is either to cause such alehouse to be suppressed, or else to present such offence at the assizes or sessions, that so such offender may be thereupon indicted. Dalt. c. 7.

And also that he may be compelled to receive a horse, altho' the owner does not lodge in his house; because by keeping of the horse he has gain, but it would be otherwise of a parcel or other dead thing. 1 Salk. 388.

VII. Soldiers quartered in alehouses.

By the yearly acts against mutiny and desertion, the constable, and in his default, a justice of the peace, may quarter soldiers in inns, livery stables, alehouses, and victualling houses; as is set forth more at large in title Soldiers.

VIII. Concerning ale vessels, and the measure of ale.

The justices in Easter sessions yearly (and mayors in corporations) shall rate the price of all barrels, kilderkins, firkins, and other vessels to be sold for ale or beer to be uttered therein: And if any cooper shall not sell the same according to such rate, he shall forfeit 3 s. 4 d.; half to the king, and half to him that shall sue. 8 El. c. 9.

Justices to rate the price of vessels.

Every barrel of beer, within the bills of mortality, shall be 36 gallons, and the barrel of ale 32 gallons; and in all other places, 34 gallons shall be reckoned for a barrel.

Barrel, what.

rel of beer or ale. 12 C. 2. c. 24. f. 34. 1 W. 3. 1. c. 24. f. 5.

Quarts and pints
to be marked.

By 11 & 12 W. c. 15. which is required to be given in charge at the sessions to the grand jury, it is enacted, that all innkeepers, alehousekeepers, sutlers, victuallers and other retailers of ale or beer, and every person keeping any publick house, and retailing and selling ale or beer, shall retail and sell the same in and from their houses, by a full ale quart or ale pint, according to the standard of the exchequer, in a vessel made of wood, earth, glass, horn, leather, pewter, or of some other good and wholesome metal, made and sized to the standard, and signed, stamped, or marked to be of the content of the said ale quart or ale pint, according to the said standard, either from the exchequer, or from some city, town corporate, borough, or market town where a standard ale quart or pint, made from the said standard, shall be kept for that purpose; and shall not retail and utter any ale or beer, in any other vessel not signed and marked; on pain of forfeiting not above 40 s. nor under 10s. for every offence, half to the poor, and half to him that shall prosecute or sue for the same, to be recovered before one justice, by the oath of one witness, and to be levied by warrant of distress, rendering the overplus, deducting thereout the reasonable charges. The prosecution to be within thirty days. f. 1, 6.

And moreover he shall not detain any goods for the reckoning, but shall be left to his action at law. f. 2.

But it is not necessary that beer or ale sold to be spent out of the house, be carried away in standard measures; but it is sufficient if it be measured out by the standard.

f. 7.

Who shall mark
them.

And every mayor, or chief officer of every city, town corporate, borough, or market town, shall on request to him made, cause all ale quarts and ale pints, made of wood, earth, glass, horn, leather, pewter, or other good and wholesome metal, which shall be brought to him, to be measured and sized with the standard in his custody, and shall then cause the same, and every of them, to be plainly and apparently signed, stamped, and marked with W R and a crown, for which they shall not receive above one farthing for each measure; on pain of 5 l. to be recovered as aforesaid, and he shall also pay to the party grieved treble damages with costs, by action at law. 11 & 12 W. c. 15. f. 5.

Note, Most of the books do set forth that the sub-commissioners or collectors of excise shall procure standard quarts and pints out of the exchequer, for every market town;

town; but this was only required of them before *June 24, 1700*, and not since. *f. 3.*

An indictment will lie for selling ale in pots unsealed, *Indictment.* altho' the statute appoints another method of proceeding; because measures are by the common law, and the statutes only direct the manner of ascertaining them. *Black-
erty 10.*

But in such case the indictment must not be upon the statute, but at the common law; and the offence ought to be laid, not for selling in pots unsealed, that being no offence at common law, but in pots wanting measure.

IX. Enhancing the price of ale.

By the 2 & 3 *Ed. 6. c. 15.* If any brewers shall conspire to sell their victuals but at certain prices; they shall, on conviction in the sessions, or leet, by witness, confession, or otherwise, forfeit 10 l. to the king for the first offence, and if not paid in six days, they shall be imprisoned twenty days; for the second offence, 20 l. in like manner, or the pillory; for the third offence 40 l. in like manner, or the pillory, loss of an ear, and to become infamous. But by the 2 *G. 3. c. 14.* No brewer, innkeeper, victualler, or other retailer of strong beer or ale, shall be sued or molested by indictment, information, popular action, or otherwise, for advancing the price of strong beer or ale, in a reasonable degree.

X. Innkeepers suffering tippling or gaming in their houses.

By the 1 *J. c. 9.* If any innkeeper, victualler, or alehousekeeper, or tavernkeeper keeping an inn or victualling house, shall suffer any person inhabiting in any city, town corporate, market town, village, or hamlet, where such inn, tippling house, or alehouse shall be [and by 1 *C. c. 4.* wherever he shall inhabit] to continue drinking or tippling therein (except such as shall be invited by any traveller, and shall accompany him only during his necessary abode there: and except labouring and handicraftsmen in cities, towns corporate, and market towns, upon the usual working days, for one hour at dinner time, to take their diet in an alehouse; and except labourers and workmen, which for the following of their work by the

Penalty on suffering tippling, or drinking.

Alehouses.

the day or by the great, in any city, town corporate, market town or village, shall for the time of their said continuing in work there, sojourn, lodge or victual in any inn, alehouse, or other victualling house; and except for urgent and necessary occasions to be allowed by two justices); he shall, on conviction thereof before the mayor or a justice of the peace, on view or confession, or oath of one witness, forfeit 10 s. to the poor. 1 J. c. 9. f. 2.

1 C. c. 4. 21 J. c. 7.

Penalties how to be recovered.

The same to be levied by the constables or churchwardens by way of distress; and for default of satisfaction in six days, the distress to be appraised and sold, rendering the overplus; and for want of sufficient distress, the party offending to be by such mayor or justice committed to the common gaol, there to remain until the penalty be truly paid. 1 J. c. 9. f. 3.

And if the constables or churchwardens do neglect their duty in levying, or do not levy the penalties; or in default of distress, do neglect to certify the default, by the space of 20 days, to such mayor or justice; every person so offending shall forfeit 40 s. to the poor, to be levied by way of distress by warrant from such mayor or justice; the distress to be detained six days; in which time if payment be not made, the goods to be appraised and sold, returning the overplus; for want of sufficient distress, the constable or churchwarden so offending, to be by such mayor or justice committed to the common gaol, there to remain until the penalty be truly paid. 1 J. c. 9. f. 4.

And also, the said offence may be inquired of and presented before justices of assize, justices of the peace in their sessions, mayors in corporations, and in the leet; and thereupon such due proceedings shall be had for the conviction, as in such like cases upon any indictment or presentment is used. 4 J. c. 5. f. 5.

And all constables, churchwardens, aleconners and sidemen, shall, in their several oaths incident to their offices, be charged to present the said offence. *Id.* f. 7.

Innkeepers suffering tippling, disabled from keeping an alehouse for 3 years.

And moreover, if any alehousekeeper shall suffer any person inhabiting in any city, town corporate, market town, village or hamlet, where such inn, tippling house, or alehouse shall be, to continue drinking or tippling therein as aforesaid; he shall be disabled for the space of three years to keep any such alehouse. 21 J. c. 7. f. 4.

Innkeepers suffering gaming.

By the 30 G. 2. c. 24. If any person licensed to sell any sorts of liquors, or who shall sell or suffer the same to be sold in his house, out-house, ground, or apartment therto belonging, shall knowingly suffer any gaming with cards,

cards, dice, draughts, shuffle boards, mississi, or billiard tables, skittles, nine pins, or with any other implement of gaming in his house, out-house, ground, or apartment thereunto belonging, by any journeymen, labourers, servants, or apprentices; and shall be convicted thereof on confession, or oath of one witness, before one justice within six days after the offence committed; he shall forfeit for the first offence 40 s. and for every other offence 10 l. by distress by warrant of such justice; three fourths of which shall be to the churchwardens for the use of the poor, and one fourth to the informer. *s. 14.*

And if any journeyman labourer, apprentice, or servant, *shall game* in any house, out-house, ground, or apartment thereto belonging, wherein any liquors shall be sold, and complaint thereof shall be made on oath before one justice where the offence shall be committed; he shall issue his warrant to the constable or other peace officer of the place wherein the offence is charged to have been committed, or where the offender shall reside, to apprehend and carry the offender before some justice of the place where the offence shall be committed, or where the offender shall reside; and if such person shall be convicted thereof by the oath of one witness or confession, he shall forfeit not exceeding 20 s. nor less than 5 s. as the justice shall order, every time he shall so offend and be convicted as aforesaid, one fourth to the informer, and three fourths to the overseers for the use of the poor; and if he shall not forthwith pay down the same, such justice shall commit him to the house of correction or some other prison of the place where he shall be apprehended, to be kept to hard labour for any time not exceeding one month, or until he shall pay the forfeiture. *s. 15.*

Persons guilty of gaming in public houses.

And any justice unto whom complaint upon oath shall be made, of any offence committed against this act, shall issue his warrant for bringing before him or some other justice of such place, the person charged with such offence; and the justice before whom he is brought shall hear and determine the matter, and proceed to judgment and conviction: and if it shall appear upon oath to the satisfaction of such justice, that any person within his jurisdiction can give material evidence on behalf of the prosecutor or of the person accused, and who will not voluntarily appear; he shall issue his summons to convene him to give his evidence; and if he shall neglect or refuse to appear on such summons, and no just excuse shall be offered, then (on proof upon oath of the summons having been duly served upon him) he shall issue his warrant to bring

Power of the justice.

bring such witnesses before him ; and on his appearance, if he shall refuse to be examined on oath, without offering just cause for such refusal, the justice shall commit him to the public prison for any time not exceeding three months. *f. 16.*

Who may be witnesses.

And in all proceedings on this act, any person shall be admitted to be a witness, notwithstanding his being an inhabitant of the place wherein the offence shall have been committed. *f. 18.*

Conviction.

And the justice before whom any person shall be convicted upon this act, shall cause the conviction to be drawn up in the form, or to the effect following ;

To wit. *BE* it remembered, that on this — day of — in the — year of his majesty's reign A. B. is convicted before — of his majesty's justices of the peace for the said county of — [or, for the — riding, or division of the said county of — or, for the city, liberty, or town of — as the case shall be] for — and the said — do adjudge him, or her, to pay and forfeit for the same, the sum of — Given under — the day and year aforesaid.

The same to be written upon parchment, and transmitted to the next sessions, to be filed amongst the records: and if any person shall appeal to the said sessions, the justices there shall, upon receiving the said conviction, proceed to hear and determine the matter. *f. 19.*

Certiorari.

And no certiorari shall be granted, to remove any proceedings on this act. *f. 20.*

Appeal.

And if any person convicted of any offence punishable by this act, shall think himself aggrieved by the judgment of the justice before whom he shall have been convicted, he may appeal to the next sessions, and the execution of the judgment shall in such case be suspended, the person convicted entering into recognizance at the time of the conviction, with two sureties in double the sum he shall have been adjudged to pay, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the said sessions : and the sessions shall award such costs as shall appear just and reasonable to be paid by either party ; and if the judgment shall be affirmed, the appellant shall immediately pay the sum adjudged to be forfeited together with such costs as the court shall award, or in default thereof shall suffer the pains and penalties by this act inflicted upon persons re-

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pectively who shall neglect to pay or shall not pay the forfeitures by this act to be paid. *f. 21.*

And no person punished by this act, shall be punished by any other law. *f. 22.*

XI. Persons guilty of tippling.

If any person (unless those excepted under the foregoing head, by 1 *J. c. 9.*) shall continue drinking or tippling, in any inn, victualling house, or alehouse, or any tavern keeping an inn or victualling house; he shall, on conviction thereof before the mayor or a justice of the peace, on view, confession, or oath of one witness, forfeit for every offence 3 s. 4 d. to be paid within one week next after the conviction, to the churchwardens, who shall be accountable for the same to the use of the poor: And if he shall refuse or neglect to pay the same, it shall be levied by distress: And if he be not able to pay the forfeiture, then the mayor, justice, or court where the conviction shall be, may punish the offender, by setting him in the stocks for every offence by the space of four hours. 4 *J. c. 5. f. 4. 1 J. c. 9. 21 J. c. 7. 1 G. c. 4.*

Penalty of tippling.

The said offence may also be inquired of and presented, before justices of assize, justices of the peace in sessions, mayors, and in the leet; and proceeding shall be had thereupon for the conviction, as upon indictment or presentment. 4 *J. c. 5. f. 5.*

The offender to be presented, indicted, or convicted in six months. *Id. f. 11.*

And all constables, churchwardens, aleconners, and sidemen, shall in their several oaths incident to their offices, be charged to present the said offence. 21 *J. c. 7. f. 5.*

And if any alehousekeeper shall be convicted of the said offence, he shall moreover for the space of three years be disabled to keep any such alehouse. 7 *J. c. 10. 21 J. c. 7. f. 4.*

Alehousekeeper guilty of tippling.

XII. Concerning drunkenness.

Drunkenness excuseth no crime; but he who is guilty of any crime whatever, thro' his voluntary drunkenness, shall be punished for it as much as if he had been sober. Drunkenness no excuse.

1 *How. 2.*

If any offend their brethren by drunkenness, the churchwardens and sidemen shall present the same to the ordinary, that Spiritual censore.

that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can. 109.*

And all constables, churchwardens, aleconners, and sidemen, shall be sworn to present the offence of drunkenness. 4 *J. c. 5. f. 7.*

Penalty for the first offence.

Every person who shall be drunk, and thereof shall be convicted (M N) before one justice, or mayor, on view, confession, or oath of one witness, shall forfeit for the first offence 5 s. to be paid within one week after conviction, to the churchwardens (O), who shall be accountable for the same to the use of the poor; and if he shall refuse or neglect to pay the same as aforesaid, it shall be levied by distress (P); and if the offender be not able (Q) to pay the said sum of 5 s. he shall be committed to the stocks (R), there to remain by the space of six hours. 4 *J. c. 5. f. 2.* 21 *J. c. 7. f. 1, 3.*

And if any constable, or other inferior officer to whom that shall be given in charge by the precept of any mayor or justice, do neglect the due correction of the offender, or the due levying of the penalties where distress may be had; every person so offending shall forfeit 10 s. to be levied by distress, by any other person having warrant from any mayor, justice, or court, where any such conviction shall be, to be paid to the churchwardens, who shall account for the same, to the use of the poor where the offence shall be committed. 4 *J. c. 5. f. 3.*

Second offence.

And if any person once convicted of drunkenness, shall after that be again convicted of the like offence, he shall be bounden with two sureties in a recognizance or obligation of 10 l. with condition to be from henceforth of good behaviour. 4 *J. c. 5. f. 6.* 21 *J. c. 7. f. 3.*

To be of good behaviour] Lord Hale, speaking of the statute of 34 *Ed. 3. c. 1.* which gave justices power to bind malefactors to the good behaviour, generally, without any time limited, says, that it is not meant that the same shall be perpetual, but in the nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour. 2 *H. H. 136.*

Who may inquire thereof.

The said offence may also be inquired of and presented before justices of assize, justices of the peace in their sessions, mayors, and in theleet; and thereupon process shall be had for the conviction, as upon indictment or presentment. 4 *J. c. 5. f. 5.*

In what time.

But the offenders shall be presented, indicted or convicted in six months. *Id. f. 11.*

It is also provided, that this act shall not abridge the ecclesiastical jurisdiction. *Id.* f. 8.

But when the offender hath been once punished, by any the ways before mentioned, he shall not be punished again by any other ways or means. *Id.* f. 9.

None to be twice punished for the same offence.

If any alehousekeeper shall be convicted of being drunk; he shall, besides the penalties abovementioned, be utterly disabled to keep any such alehouse, for the space of three years next ensuing the conviction. 7 J. c. 10.

Alehousekeeper drunk.

Every person in his majesty's pay in the navy, being guilty of drunkenness, shall incur such punishment as a court martial shall think fit to impose. 22 G. 2. c. 33. Art. 2.

Navy.

XIII. Detaining goods for the reckoning.

An innkeeper may detain the person of the guest who eats, or the horse which eats, till payment. And this he may do, without any agreement for that purpose. For men that get their livelihood by entertainment of others, cannot annex such disobliging condition, that they shall retain the party's property in case of nonpayment; nor make such disadvantageous and imprudent a supposition, that they should not be paid. And therefore the law annexes such a condition, without the express agreement of the parties. *Bac. Abr. Inns.*

General power of detaining.

For it would be hard to oblige him to sue for every little debt; and a greater hardship, that he might not be able to find who was his guest. *Id.*

But an horse committed to an innkeeper, may be detained only for his own meat, and not for the meat of the guest, or of any other horse: for the chattels in such case are only in the custody of the law for the debt that arises from the thing itself, and not for any other debt due from the same party; for the law is open for all such debts, and doth not admit private persons to take reprisals. *Bac. Abr. Inns.* 1 *Bull.* 267.

Horse to be detained only for his own meat.

Also, if any innkeeper, alehousekeeper, victualler, or futler, in giving any account or reckoning in writing, or otherwise, shall refuse or deny to give in the particular number of quarts or pints, or shall sell in measures unmarked; it shall not be lawful for him, for default of payment of such reckoning, to detain any goods or other thing, belonging to the person or persons from whom such reckoning shall be due, but he shall be left to his action at law for the same, any custom or usage to the contrary notwithstanding. 14 & 12 W. c. 15. f. 2.

Reckoning to be in particulars; and vessels to be sealed.

Goods suffered
to be taken
away, not to
be retaken.

Goods seized,
not to be used.

Whether they
may be sold.

In like manner if the innkeeper gives credit to the party for that time, and lets him go without payment; then he hath waived the benefit of the custom, and must rely on his other agreement. 8 *Mod.* 172.

An innkeeper that detains a horse for his meat, cannot use him; because he detains him as in custody of the law: and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer. *Bac. Abr. Inns.*

But by the custom of *London* and *Exeter*, if a man commit an horse to an innkeeper, and he eat out his price; the innkeeper may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffick with strangers, that could not be known, to charge them with the action. But the innkeeper hath no power to sell the horse, by the general custom of the realm. *Bac. Abr. Inns.*

So in the case of *Jones and Pearle, E. 9 Gr.* In trover for three horses, the defendant pleaded that he kept a public inn at *Glaassenbury*, and that the plaintiff was a carrier, and used to set up his horses there; and 3*l.* being due to him for keeping the horses, which was more than they were worth; he detained and sold them, as well he might: But on demurrer, judgment was given for the plaintiff; an innkeeper having no power to sell horses, except by special custom, as in the city of *London*. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again. *Str.* 556.

XIV. Goods of a guest stolen out of an inn.

Innkeeper an-
swerable for
goods stolen,

Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journeys, and are in a more peculiar manner protected by the law: it is for this reason, that the innkeeper shall answer for those things which are stolen within the inn, though not delivered to him to keep, and tho' he was not acquainted that the guests brought the goods to the inn; for it shall be intended to be thro' his negligence, or occasioned by the fault of him or his servants. 8 *Co. Calley's case*,

So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen, he must make satisfaction. (But otherwise, if with his direction.) *Id.*

In like manner, if an innkeeper bids his guest take the key of his chamber and lock the door, and tells him that he

he will not take the charge of the goods; yet if they are stolen he shall be answerable: because he is charged by law for all things which come to his inn; and he cannot discharge himself by such or the like words. *Dalt. c. 56. Blackerby. 169.*

Holt C. J. doubted whether a man is a guest by setting up his horse at an inn, though he never went into the inn himself; but the other three justices held, that such person is a guest by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain; otherwise if he had left a trunk, or a dead thing. *1 Salk. 388.*

Who shall be deemed a guest in this respect.

So if a man comes to an inn, with a hamper, in which he hath certain goods (to wit, hats, as the case was), and departs leaving it with the host, and two days after comes again; whereas in the time of his absence this was stolen; he shall not have any action against the host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore shall not be charged for the loss thereof in his absence. *1 Roll's Abr. 2.*

If an attorney hires a chamber in an inn for a whole term, the host is not chargeable with any robbery in it, because the party is as it were a lessee. *Mo. 877.*

If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink there; he is no guest, but a lodger, and so not under the innkeeper's protection; but if he eats and drinks, or pays for his diet there, it is otherwise. *12 Mod. 255.*

B. 33 G. 3. Bennet v. Mellor. The defendant was an innkeeper, against whom the plaintiff brought his action for the value of goods stolen out of the inn. At the trial before *Buller J.* at the last *Lancaster* assizes, it appeared that the plaintiff's servant had taken the goods in question to market at *Manchester*, and not being able to dispose of them, went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the week following [meaning the next market day]; she said, she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, and had some liquor, and put the goods on the floor immediately behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was found for the plaintiff; and in reporting this case upon a motion for a new trial, *Buller J.* observed that he was of opinion, that if the defendant's wife had accepted the charge of the

Innkeeper refusing to take charge of goods because his house is full of parcels, yet if the owner stop as a guest and the goods are stolen, the innkeeper is liable to make good the loss.

goods upon the special request made to her, he should have considered her as a special bailee, and not answerable in this case, having been guilty of no actual negligence; but that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence; in which case the innkeeper was liable to make good the loss.—*Ashburnst, J. (a)* It does not appear to me that there is any ground for a new trial. If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the mere negligence of the plaintiff's servant, the case might have deserved greater consideration; but nothing of that kind appears on the judge's report. According to the report, the case was simply this: the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week; that proposal was rejected; then he sat down in the inn as a guest, with the goods behind him; and during that time, the goods were taken away. But although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.—*Buller J.* Although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited, where the innkeeper said his house was full, and refused to take in the guest; that, if true, is a good excuse; and if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week: if the defendant had taken the goods upon that request, he could only have been liable as a bailee; but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable: if they be in the inn, that is sufficient to charge him. In *Cady's (b)* case, it is said, "Although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them; yet if they be carried away, or stolen, the innkeeper shall be charged; and therewith agrees" "42 Ed. 3. 11." There it is said, that on the words of the writ, the innkeeper is answerable for every thing in

(a) *L. Kenyon* was absent.

(b) Above.

his inn, but not for a horse, which the owner orders to be put out to pasture. One of the passages cited from *Com. Dig.* cannot be supported, if taken in a general sense; for all the authorities agree, that it is not necessary to prove negligence in the innkeeper.—*Grose J. Calye's* case, which is a good comment on the writ which gives this action, decides this present case. According to that, if a man go into an inn, and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest; and so says the case in *Dyer*. If indeed the innkeeper had refused to take in the plaintiff's servant as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods; in such a case, the innkeeper refuses at his peril; and if it be without reason, an action lies for the refusal; but in this case there was no refusal of the person; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper (for the latter did not object to receive him), he was in the same situation as any other guest, and entitled to the same protection for his goods. Rule discharged. *Durnf. & East*, 5 V. 273.

Soldiers billeted are guests. *Clayt.* 97.

XV. Guests stealing goods.

A guest in a common inn, arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, altho' there was no trespass in the taking of them (which yet is generally required in cases of felony). *Dalt. c.* 40.

[NOTE, The universities are generally excepted out of these acts concerning alehouses.]

Alehouses.

A. B. Precept to the high constable to issue warrants to the petty constables, to summon alehousekeepers to be licensed; on 5 & 6 Ed. 6. c. 25. 2 G. 2. c. 28. and 26 G. 2. c. 31.

Westmorland. } To John Bowness, gentleman, high constable of the East Ward within the said county.

IN pursuance of the statutes in that case made, these are to require you, on sight hereof, to issue out your warrants to all petty constables belonging to the several constablewicks within your said ward, in the form, or to the effect hereon indorsed. Given under our hands and seals the — day of —

J. P.
K. P.

Form of the warrant as above directed :

Westmorland, } To the constable of —
East Ward.

BY virtue of a warrant from his majesty's justices of the peace acting within the said ward to me directed, you are hereby required to give notice to all licensed inn-keepers and alehousekeepers within your constablewick, and also to all persons unlicensed (so far as the same shall come to your knowledge) who do intend to offer themselves to be licensed at the next general meeting of the said justices for that purpose, that they do personally appear before the said justices at — on the — day of September next, at the hour of — in the forenoon of the same day, to take or renew their licences for the year ensuing; and also to give them notice, that every person then and there to be licensed, must personally enter into a recognizance in the sum of 10*l.*, together with two sureties in 5*l.* each, or one surety in 10*l.*, that they will not use or suffer any unlawful games, and that they will keep good order and rule within their respective houses and other places; and if any shall be hindered by sickness, or other reasonable cause to be allowed by the said justices, that he must procure two sureties then and there to be bound in like manner in 10*l.* each.

And unto such persons as have not been licensed for the year preceding, you are further to give notice, that no licence will be granted to any of them, unless he shall also, at the same time and place, produce a certificate under the hands of the minister and

and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders of the place where he inhabiteth, setting forth that he is of good fame, and of sober life and conversation.

And you are to make a return to the said justices, at the same time and place, in writing under your hand, containing the names of all such persons as you shall have summoned so to appear before them as is aforesaid, together with their dwelling places, and the signs by which their houses are known.

Hereof fail not. Given under my hand at Raisbeck in the said county the — day of — in the year of our Lord —

John Bownes, high constable.

C. Certificate from the minister, &c.

WE the minister and major part of the churchwardens and overseers of the poor of the parish of — in the county of Westmorland, do hereby certify that A. I. of — in the said county, yeoman, is a person of good fame, and of sober life and conversation. Witness our hands, the — day of — in the year of our Lord —.

A. M. Minister.

A. C. }
B. C. } Churchwardens.

A. O. }
B. O. } Overseers.

D. Licence to keep an alehouse; on the 5 & 6 Ed. 6. c. 25. 2 G. 2. c. 28. and 26 G. 2. c. 31.

Westmorland, } *AT* a general meeting of his majesty's justices of the peace for the said county, acting within the division of the East Ward aforesaid in the county aforesaid, holden at — in and for the said division, for licensing persons to keep common inns and alehouses the — day of September in the — year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our Lord —.

We his majesty's justices of the peace for the said county, whose hands and seals are hereunto set (whereof one is of the quorum) assembled at the said general meeting, do allow and licence A. B. yeoman, at the sign of — in — within the division and county aforesaid, to keep a common alehouse or victualling

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selling house, and to utter and sell victuals, beer, ale, cyder, and other exciseable liquors, to be drunk in the same house wherein he now dwelleth, and not elsewhere, for one whole year from the 29th day of this present month of September, and no longer: So as the true offize in bread, beer, ale, and other liquors, hereby allowed to be sold, be duly kept; and no unlawful game or games, drunkenness or any other disorder be suffered in his house, yard, garden, or backside; but that good order and rule be maintained and kept therein, according to the laws of this realm in that behalf made. Given under our hands and seals the day and year first above written.

If he hath not been licensed the year before, then these words must be inserted, ——— (A certificate under the bands of ——— having been first produced unto us, setting forth that the said ——— is of good fame, and of sober life and conversation.)

But if such person hath been licensed the year before, this certificate is not required; and therefore to insert the same in all licences is absurd; and, if executed by the justices in such form, must be in many instances not true.

E. Recognizance of an alehousekeeper; on 5 & 6 Ed. 6. c. 25. and 26 G. 2. c. 31.

Westmorland. *BE* it remembred, that on the ——— day of ——— in the ——— year of the reign of ——— A. P. of ——— in the county aforesaid, innkeeper, and A. S. of ——— yeoman, and B. S. of ——— yeoman, personally came before us ——— esquires, justices of the peace for the said county, and acknowledged themselves to owe to our said sovereign lord the king, that is to say, the said A. P. the sum of 10*l*, and the said A. S. and B. S. the sum of 5*l*. each of good and lawful money of Great-Britain, so he made and levied of their goods and chattels, lands and tenements respectively, to the use of our said sovereign lord the king, his heirs and successors, if the said A. P. shall make default in the condition underwritten.

THE condition of this recognizance is such, that whereas the above bounden A. P. is licensed to keep a common inn and alehouse for one year from the 29th day of this present month of September in the house where he now dwelleth at ——— aforesaid; if he the said A. P. shall keep and maintain good order and rule, and shall suffer no disorders or unlawful games to be used in his said house, nor in any outhouse, yard, garden, or

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or backside, thereunto belonging, during the said term, then this recognizance shall be void.

Taken and acknowledged the day and
year above written, before us,

J. P.
K. P.

F. Information for selling ale without licence; on the 35 G. 3. c. 113:

County of } *BE it remembred, that on the — day of*
 — in the — year of the reign of our so-
veraign lord George the third, by the grace of God king of Great
Britain, &c. and in the year of our Lord —, at — in the
said county of —, A. I. of — in the county of —
gentleman, who prosecutes as well for the poor of the parish of
— in the said county of — as for himself, in this be-
half, in his proper person, cometh before me I. P. esquire, one
of the justices of our said lord the king, assigned to keep the peace
of our said lord the king in and for the said county of —,
and also to hear and determine divers felonies, trespasses, and
other misdemeanors in the said county committed, and as well
for the poor of the said parish of — in the said county of
— as for himself, giveth me the said justice to understand
and be informed, that after the 20th day of September 1795,
and within six months next before the day of exhibiting the said
information, to wit, on the — day of — in the year of
our Lord one thousand seven hundred and —, at the parish
of — in the said county of —, one A. O. of the parish
of — in the county of — yeoman, did sell ale, or beer,
or any other exciseable liquors, (particularizing which of them,
as the case shall happen to be,) by retail, in the house of
him the said A. O. situate, standing and being in the said parish
of — in the said county of — without being licensed
thereto according to law; whereby, and by force of the statute
in such case made and provided, the said A. O. hath forfeited
for his said offence the sum of twenty pounds, and also the
costs and expenses attending the convicting the said A. O. of
the said offence, one moiety of the said penalty of 20l. to him
the said A. I. and the other moiety thereof to the use of the poor
of the said parish of — (being the parish in which
the said offence was committed); and that A. W. of the
parish of — in the county of — yeoman, is a ma-
terial witness to be examined concerning the premises: and the
said A. I. who prosecutes as aforesaid, prayeth that the said
A. O. may be convicted of the said offence, and that one moiety

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of the said penalty of 20 l. may be adjudged to him the said A. I. and the other moiety thereof to the use of the poor of the said parish of ———, according to the form of the statute in such case made and provided; and that the said A. O. may be summoned to answer the said information, and make his defence thereto, and the said A. W. to testify his knowledge therein, before me the justice aforesaid.

G. Summons of a person for selling ale without licence; on the 35 G. 3. c. 113.

County of } To A. O. and to the constable of ——— in
 } the said county.

WHEREAS an information hath been this day exhibited by A. I. of ——— in the county of ——— gentleman, who prosecutes as well for the poor of the parish of ——— as for himself in this behalf, before me I. P. esquire, one of the justices of our said lord the king assigned to keep the peace of our said lord the king in and for the said county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, setting forth, that after the 20th day of September 1795, and within six months next before the day of exhibiting the said information, to wit, on the ——— day of ——— in the year of our Lord one thousand seven hundred and ———, at the parish of ——— in the said county of ———, you A. O. of the parish of ——— in the county of ——— yeoman, did sell ale, or beer, or any other exciseable liquors, (particularizing which of them, as the case shall happen to be,) by retail, in the house of you the said A. O. situate, standing and being in the said parish of ——— in the said county of ———, without being licensed thereto according to law; whereby, and by force of the statute in such case made and provided, you the said A. O. have forfeited for your said offence the sum of 20 l. and also the costs and expences attending the convicting you thereof, one moiety of the said penalty of 20 l. to him the said A. I. and the other moiety thereof to the use of the poor of the said parish of ——— (being the parish in which the said offence was committed), and praying that you the said A. O. may be convicted of the said offence, and that one moiety of the said penalty of 20 l. may be adjudged to him the said A. I. and the other moiety thereof to the use of the poor of the said parish of ———, according to the form of the statute in such case made and provided: These are therefore to require you the said A. O. to appear before me on the ——— day of ——— next ensuing, at the hour of ——— in the forenoon of the same day, at the house of ——— situate in ——— in the

the said county of ———, to answer the matter of complaints contained in the said information, and to shew cause, if any you have, why you should not be convicted of the said offence charged in the said information; and I do authorize you the said A. C. to serve this my summons, and do require you the said A. C. to attend me at the time and place last abovementioned, then and there to make a return to me of the execution of this my summons. Herein you the said A. C. fail not. Given under my hand and seal, at ——— in the county of ———, the ——— day of ——— in the ——— year of the reign of our said sovereign lord the now king, and in the year of our Lord one thousand seven hundred and ———.

Note, a summons for a witness, in behalf of either of the parties, may easily be extracted from the premises; or may be inserted in the above summons of the offender, by adding after the words, "*This my summons;*" And you the said constable are hereby further required to summon A. W. of ——— in the said county of ——— to appear before me at the time and place aforesaid, to testify his knowledge in and concerning the premises. Herein, &c.

H. Conviction for selling ale without licence; on the 35 G. 3. c. 113. specially directed by the 26 G. 2. c. 31.

Middlesex. } **A.** *B. is convicted on his (or her) own confession (or, on the oath of ———) of having sold ale, beer, or other liquors, in the parish of ——— in this county, on the ——— day of ——— without being licensed thereto according to law (or, after being disabled to sell, as the case may be). This is the first (or second) offence. Given under my hand and seal this ——— day of ———.*

I. Notice of the above conviction, to be given either personally, or left at the place where the offence was committed.

County of } To the constable of ———
————— }

WHEREAS A. O. of ——— in the county of ——— yeoman, is this ——— day of ——— duly convicted before me J. P. esquire, one of his majesty's justices of the peace in and for the said county of ——— of having sold ale, beer, or other unlicensable liquors, (or as the case may be,) without being duly licensed so to do; whereby he hath forfeited the sum of

Alehouses.

20l. besides the costs and expences attending the said conviction, which costs and expences I have ascertained and assessed at the sum of ——— pursuant to the statute in that case made and provided: These are therefore to authorize and require you the said constable to give notice thereof unto the said A. O. and to demand and receive of him the said A. O. the sum of ———, whereof you are to pay the sum of ——— to A. I. of ———, who informed me of the said offence, and 10l. the remainder thereof you are to pay to the churchwardens, or overseers of the poor of the parish of ———, for the use of the poor of the said parish (being the place where the said offence was committed). And if the said A. O. shall refuse or neglect to pay the same for three days after notice of this my order, you are to certify the same unto me, that such further proceedings may be had thereon as to law doth appertain. Given, &c.

K, Warrant of Distress on non-payment of the penalty for selling ale without licence; on the 35 G. 3. c. 113. not to be issued till three days after service of the above notice.

County of } To the constable of ——— in the said county.

WHEREAS by a certain conviction, under my hand and seal, bearing date the ——— day of ——— in the year of our Lord ———, A. O. of ——— in the county of ——— yeoman, was and is duly convicted before me J. P. Esquire, one of the justices of our lord the king, assigned to keep the peace of our said lord the king in and for the said county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, on his (or her) own confession, (or, on the oath of ———,) of having sold ale, beer, or other liquors, (specifying which of them, as the case shall happen to be,) in the parish of ——— in the said county of ——— on the ——— day of ———, without being licensed thereto according to law, (or, after being disabled to sell, as the case may be,) whereby he forfeited the sum of 20l. besides the costs and expences attending the said conviction, which costs and expences I have ascertained and assessed, and do hereby ascertain and assess, at the sum of ——— pursuant to the statute in such case made and provided: (If the conviction was made in the absence of the party say, And whereas the said A. O. on the ——— day of ——— last past had due notice of the said conviction, but hath hitherto altogether neglected and refused to pay, and hath not yet paid, the said several sums of ——— and ——— or any part thereof respectively :) These are therefore to command you to distrain the goods and

Alehouses.

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and chattels of the said A. O. whereforever they shall or maybe found within my jurisdiction, and also any goods or chattels found or being in the house of the said A. O. situate, standing and being in the said parish of — in the said county of — (being the house in which the said offence was committed), or which shall be found or be in any house, outhouse, cellar, vault, or other storehouse, belonging thereto, or occupied therewith, and on the goods and chattels so distrained to levy the said several sums of 20l. and —, and if within the space of five days (a) next after such distress by you made, the said several sums of 20l. and —, together with the reasonable charges of keeping the said distress, to be allowed by me the said justice, shall not be paid, that then you do sell the said goods and chattels so by you distrained as aforesaid, and out of the money arising by such sale, that you do pay one moiety of the said penalty or sum of 20l. and also the said sum of — (being the costs and expences aforesaid), to A. I. of — in the county of — yeoman, who informed me of the said offence, and the other moiety of the said penalty or sum of 20l. to the overseers of the poor of the parish of — in the said county of — to the use of the poor of the said parish (being the parish in which the said offence was committed), returning to him the said A. O. the overplus on demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted: And you are hereby commanded to certify to me the said justice, on the — day of — now next ensuing, what you shall do by virtue of this my warrant. Given under my hand and seal, at — in the said county of — the — day of — in the — year of the reign of our said sovereign Lord the now king, and in the year of our Lord —.

Return of Nulla Bona to be indorsed upon the warrant.

I do hereby certify to J. P. the justice within named, that the within named A. O. hath not any goods or chattels belonging to him the said A. O. within the jurisdiction of the said justice, and that there are not any goods or chattels found or being in the house of the said A. O. situate, standing and being in the said parish of — in the said county of — (being the house in which the offence within mentioned was committed), or in any house, outhouse, cellar, vault, or other storehouse, belonging thereto, or occupied therewith, whereof I can levy the within mentioned several sums of 20l. and — or any part

(a) By 27 G. 2. c. 20. s. 1. not less than four nor more than eight days.

thereof

Alehouses.

thereof respectively, as within I am commanded. Dated this
 — day of — in the year of our Lord one thousand
 seven hundred and —.

A. C. Constable of —
 within named.

L. Commitment on non-payment of the penalty
 for selling ale without licence ; on the 35 G. 3.
 c. 113.

County of { To the constable of — in the said coun-
 — ty, and to the keeper of his majesty's gaol
 at — in the said county.

WHEREAS by a certain conviction, under my hand and
 seal, bearing date the — day of — in the year of our
 Lord —, A. O. of — in the county of — yeoman, was
 and is duly convicted before me J. P. esquire, one of the justices
 of our lord the king, assigned to keep the peace of our said lord
 the king in and for the said county of —, and also to hear
 and determine divers felonies, trespasses, and other misdemeanors
 in the said county committed, on his (or her) own confession,
 (or on the oath of —) of having sold ale, beer, or other
 liquors, (specifying which of them, as the case shall happen
 to be,) in the parish of — in the said county of — on
 the — day of — without being licensed thereto according
 to law, (or, after being disabled to sell, as the case may be,)
 whereby he forfeited the sum of 20 l. besides the costs and
 expences attending the said conviction, which costs and expences
 I have ascertained and assessed at the sum of — pursuant to
 the statute in such case made and provided ; and whereas the
 said A. O. on the — day of — last past, had due notice
 of the said conviction, but hath hitherto altogether neglected
 and refused to pay, and hath not yet paid, the said several
 sums of 20 l. and — or any part thereof respectively ; and
 whereas on the — day of — last past, I did issue
 my warrant to the constable of — commanding him to
 distrain the goods and chattels of the said A. O. whereforever
 they should or might be found within my jurisdiction, and
 also any goods or chattels found or being in the house of
 the said A. O. situate, standing and being in the said parish
 of — in the said county of — (being the house in
 which the said offence was committed), or which should be
 found or be in any house, outhouse, cellar, vault, or other
 storehouse, belonging thereto, or occupied therewith, and that
 the said constable should certify to me the said justice, on the
 —

— day of ——— now last past, what he should do by virtue of my said warrant; and whereas it duly appears to me by the return of A. C. constable of ——— aforesaid, dated the — day of ——— last past, that the said A. O. hath not any goods or chattels belonging to him the said A. O. within the jurisdiction of me the said justice, and that there are not any goods or chattels found or being in the house of the said A. O. situate, standing and being in the said parish of ——— in the said county of ——— (being the house in which the said offence was committed), or in any house, outhouse, cellar, vault, or other storehouse belonging thereto, or occupied therewith, whereof he could levy the said several sums of 20 l. and ——— or any part thereof respectively: X These are therefore to command you the said constable of ——— aforesaid, to apprehend him the said A. O. and him safely to convey to the said gaol at ——— aforesaid, and there to deliver him to the said keeper thereof, together with this precept. And I do hereby command you the said keeper of the said gaol to receive into your custody in the said gaol him the said A. O. and him there safely to keep for the space of six calendar months, unless the said several sums of 20 l. and ——— shall be sooner paid and satisfied; and for your so doing this shall be your sufficient warrant. Given under my hand and seal at ——— in the county of ——— the — day of ——— in the — year of the reign of our said sovereign lord the new king, and in the year of our Lord ———.

Where the warrant of commitment is issued by a justice of a different county to that where the offender was convicted, the following addition to it should be made at the above X: And whereas it duly appears to me, upon the oath of ——— the said constable of ——— aforesaid, that the names J. P. subscribed to the said warrant of distress are of the proper hand-writing of the said J. P. the justice granting the same, and that the said return indorsed on the said warrant of distress is a true return thereto. The other alterations that would be necessary are sufficiently obvious.

M. Information of drunkenness; on the 4 J. c. 5.
and 21 J. c. 7.

Westmorland. { The information of A. I. of — in
the county aforesaid, yeoman, exhib-
ited before me J. P. esquire, one of
his majesty's justices of the peace for
the said county, the — day of
— in the year — who on
his oath saith,

THAT A. O. of — in the county aforesaid, labourer,
on the — day of — in the year aforesaid, at the
parish of — in the said county, was drunk; contrary to
the statutes in such case made: And thereupon be the said A. I.
prayeth that be the said A. O. may forfeit the sum of five
shillings to the use of the poor of the said parish, as by the said
statutes is required.

A. I.

Before me,
J. P.

Summons thereupon.

Westmorland. { To the constable of —

FORASMUCH as information upon oath hath been
made before me J. P. esquire, one of his majesty's justices
of the peace for the said county, that A. O. of — in the
county aforesaid, labourer, on the — day of — in the
year — at the parish of — in the county aforesaid,
was drunk; contrary to the statutes in such case made: These
are therefore to require you to summon the said A. O. to ap-
pear before me at — in the said county, on — the
— day of — to answer unto the said information
and to shew cause why the penalty of five shillings should not be
levied on the goods of him the said A. O. for the said offence;
and be you then there to certify what you shall have done in
the premisses. Given under my hand and seal the —
day of — in the year —.

N. For

N. For a form of Conviction, see the general form, title **Conviction**. If the justice convict on his own view, the information and summons are needless, and the form may be thus :

Westmorland. } *BE* it remembered, that on the — day
of — in the year of our Lord —,
at the parish of — in the county of —, I L. P. esquire,
one of the justices of our said lord the king assigned to keep the
peace in and for the said county, and also to hear and determine
divers felonies, trespasses, and other misdemeanors in the said
county committed, personally saw one A. O. of the parish of
— afore said, labourer, drunk, contrary to the form of
the statutes in that case made and provided : Whereupon it is
considered and adjudged by me the said justice, that the said
A. O. be convicted, and he is by me accordingly hereby con-
victed of the offence of being drunk, upon my own view as
afore said, according to the form of the statutes in that case made
and provided : And I do hereby adjudge that the said A. O. for
the said offence hath forfeited the sum of 5 s. to be paid and
distributed as the law directs. In witness whereof I the said
justice to this present conviction have set my hand and seal, the
day and year above written.

O. Warrant to the churchwardens (if they are not
present at the conviction, or the offender makes
default by not appearing) to receive the penalty
for drunkenness ; by the 4 J. c. 5. and 21 J. c. 7.

Westmorland. } To the churchwardens of the parish
of — in the said county.

FORASMUCH as A. O. of — in the county
afore said, labourer, is convicted before me J. P. esquire,
one of his majesty's justices of the peace for the said county, for
that he the said A. O. on the — day of — in the year
— at the parish of — in the said county, was drunk,
contrary to the statutes in such case made ; whereby he hath
forfeited the sum of five shillings, to the use of the poor of the
said parish : These are therefore to require you to demand and
receive of and from him the said A. O. the said sum of five
shillings, to be by you accounted for to the use afore said : And
if he shall refuse or neglect to pay the same, by the space of one
week after such demand made ; that then you certify to me such
refusal and neglect, to the end that such proceedings may be had
thereupon, as to justice doth appertain. Given under my hand
and seal, the — day of — in the year —.

R. Warrant to levy the penalty of drunkennets,
on non-payment; by 4 J. c. 5. and 21 J. c. 7.

Westmorland. { To the constable of ——— in the said
county.

WHEREAS A. O. of ——— in the parish of ———
in the county aforesaid, labourer, was on the ———
day of ——— convicted before me ——— one of his majesty's
justices of the peace for the said county, for that he the said
A. O. was on the ——— day of ——— drunk, at ——— aforesaid,
in the parish and county aforesaid, by which he hath forfeited the sum of 5 s. And whereas I the said ——— did
issue my warrant on the ——— day of ——— to the church-
wardens of the parish of ——— aforesaid, to demand and re-
ceive the said sum of 5 s. of and from the said A. O. And
whereas it duly appears to me, as well on the oath of C. W.
churchwarden of the parish of ——— aforesaid, as otherwise,
that they the said churchwardens did on the ——— day of ———
demand the said sum of 5 s. of and from the said A. O. but
that he the said A. O. hath neglected to pay the same as aforesaid,
and that the same is not yet paid: These are therefore to
command you forthwith to levy the said sum by distraining the
goods of him the said A. O. And if within the space of [six]
days next after such distress by you taken, the said sum, to-
gether with reasonable charges for taking and keeping the said
distress, shall not be paid, that then you do sell the said goods
so by you distrained as aforesaid, and out of the money arising
by such sale, that you do pay the said sum of 5 s. to the church-
wardens of the said parish, for the use of the poor of the said
parish, rendering to him the said A. O. the overplus upon de-
mand, the necessary charges of taking, keeping, and selling the
said distress, being first deducted. And if the said A. O. be
not able to pay the said sum of 5 s. and sufficient distress can-
not be found whereon to levy the said sum, that you certify the
same to me, together with the return of this warrant. Given
under my hand and seal this ——— day of ———.

Q. Certificate by the constable of want of distress.

Westmorland. **A.** ^{C.} constable of ——— in the said county
maketh oath this ——— day of ——— in
the year ——— before me the justice within-mentioned, that he
hath made diligent search for, but doth not know of, nor can
find, any goods of the within-mentioned A. O. wherein to levy
the within sum of five shillings.

Before me the said
justice,

J. P.

A. C.

R. Com-

Alehouses.

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R. Commitment to the stocks for drunkenness,
on inability to pay the penalty; on 4 J. c. 5.
and 21 J. c. 7.

Westmorland. } To the constable of ——— in the said
county.

*WHEREAS A. O. of ——— in the said county,
labourer, was on the ——— day of ——— convicted
before me ——— one of his majesty's justices of the peace for the
said county, for that he the said A. O. was on the ——— day
of ——— drunk at ——— aforesaid, in the parish of ———
in the said county, whereby he hath forfeited the sum of 5 s.
And whereas it duly appears to me, that the said A. O. is not
able to pay the said sum of 5 s. These are therefore to require
you in his majesty's name, to set him the said A. O. in the
stocks, there to remain for the space of six hours. Given un-
der my hand and seal the ——— day of ———.*

Almanack.

BY the 9 Ann. c. 23. & 30 G. 2. c. 19. For every Day.
B sheet almanack, for one year or less, printed on one
side only, shall be paid a stamp duty of 2 d. For every
other almanack for one year, 4 d. If for more than one
year, then 2 d. for each year; but not so as to charge any
for more than if made for three years only.

And by 21 G. 3. c. 56. an additional duty of 2 d. is
laid on sheet-almanacks, whereby to advance the same to
the other almanacks not being printed on one side only,
reciting, that whereas the power of granting a liberty to
print almanacks and other books was heretofore supposed to
be an inherent right in the crown; and whereas the crown
hath by different charters granted to the universities of Ox-
ford and Cambridge, among other things, the privilege of
printing almanacks; and whereas the universities did de-
mise to the company of Stationers of the city of London,
their privileges of printing and vending almanacks and
calendars, and have received an annual sum of 1000 l. as
a consideration for such privilege; and whereas the money
so received by them hath been laid out in promoting differ-
ent branches of literature and science, to the great increase
of religion and learning, and the general benefit and ad-
vantage of these realms; and whereas the privilege of print-

ing almanacks has been by a late decision at law found to be a common right over which the crown had no controul, and consequently the universities had no power to demise the same to any particular person or body of men, whereby the payments so made to them by the company of Stationers have been discontinued: therefore out of the additional duties imposed by this act, there shall be paid to each of the said universities yearly the sum of 500 l. clear of all deductions. *f. 10.*

Books, &c. serving as almanacks.

By the 10 *Ann. c. 19.* All books and pamphlets serving chiefly to the purpose of an almanack, shall be charged as almanacks.

But where an almanack contains more than one sheet, one sheet only need to be stamped. *9 Ann. c. 23. f. 26.*

Every almanack shall be so printed that some part of the print be upon the stamp. *21 G. 3. c. 56. f. 5.*

Selling almanacks unstamped.

If any person shall expose to sale any almanack unstamped; he shall, on conviction before one justice on the oath of one witness, be committed to the house of correction not exceeding three months: And any person may apprehend and carry him before such justice; and on producing a certificate of the conviction under the hand of such justice he shall have a reward of 20 s. to be paid by the receiver general of the stamp duties. *16 G. 2. c. 26. f. 5. 30 G. 2. c. 19. f. 26.*

Annuities.

BY several acts, oath of an annuitant's life is to be made before a justice of the peace, who shall give a certificate thereof, in order to entitle such person to receive his annuity.

Apothecary. See Physicians.

Appeal.

Appeal, what.

THIS word has two significations in law; the one is, removing a cause from an inferior court, or judge, to a superior; as from one or more justices, to the quarter sessions.

The

The other kind of appeal (which is the subject of this title) is a prosecution against a supposed offender, by the party's own private action; prosecuting also for the crown, in respect of the offence against the publick. 2 *Haw.* 155.

An appeal is brought in three cases; 1. By a man for a wrong to his ancestor. 2. By a wife for the death of her husband. 3. For wrong done to the appellants themselves, as in the case of robbery, rape, or maihem. But appeals are now disused, on account of the nicety of the pleadings, and the charge of the prosecution; and the method of indictment is generally taken. *Wood, b. 4. c. 5.*

In what cases an appeal may be brought.

A person acquitted on an indictment of murder, shall not be set at liberty, but shall be recommitted, or bailed, till the year and day be past; within which time an appeal may be brought. 3 *H. 7. c. 1.*

Within what time an appeal may be brought.

It is certain that an appeal may be commenced before the sheriff and coroner, and removed from them into the king's bench by certiorari. 2 *Haw.* 156.

Appeal brought before the sheriff and coroner.

And it seems to be holden in *Fitzherbert's* abridgment, that justices of the peace have power to receive appeals; but there is much greater authority for the contrary opinion. *Id.*

Before justices of the peace.

If the person appealed shall be acquitted, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king. 13 *Ed. 1. fl. 1. c. 12.* That is, if the appeal shall appear to the court to have been malicious. 2 *Haw.* 198.

Persons acquitted on appeal.

Forasmuch as an appeal is the suit of the party as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment: for in such case he can only pardon for himself, but not for the party. 2 *Haw.* 155.

Pardon.

Apples and pears.

WHEREAS apples and pears are frequently sold by measure, commonly called water-measure, the contents whereof are very uncertain; therefore for the future, the said measure shall be round, and in diameter eighteen inches and an half within the hoop, and eight inches deep; and so in proportion: And every measure, commonly called water-measure, by which apples and pears are sold, shall be heaped as usually: And whosoever shall

Apples and pears.

sell or buy any apples or pears by any other measure, shall forfeit 10 s. half to the informer, and half to the poor; on conviction on the oath of one witness, before one justice (or mayor), to be levied by the petty constable by warrant of the said justice, by distress and sale. 1 Ann. st. 1. c. 15. s. 1.

But this shall not extend to any measure sealed and allowed by the fruiterers' company in London. s. 2.

Concerning the robbing of orchards, see title *Wood*.

Apprehending offenders. See *Arrest*.

Apprentices.

Concerning the settlement of apprentices. See title *Poor*.

- I. *Who may take apprentices.*
- II. *Who are compellable to be bound apprentices.*
- III. *Binding.*
- IV. *Binding of poor apprentices.*
- V. *Money given to bind but poor apprentices.*
- VI. *Binding poor apprentices to the sea service.*
- VII. *Differences between the master and apprentice.*
- VIII. *Apprentice stealing his master's goods.*
- IX. *Inticing away an apprentice.*
- X. *Assigning apprentices.*
- XI. *Master dying.*
- XII. *Apprentices setting up their trades.*

I. *Who may take apprentices.*

In husbandry.

EVERY person being an householder, and having and using half a plough-land in tillage, may take an apprentice above the age of ten years, and under eighteen, to serve in husbandry till twenty-one at the least, or till twenty-four at the parties can agree. 5 El. c. 4. s. 25.

In trades in towns corporate.

Every person being an householder, and twenty-four years old at the least, dwelling in any city or town corporate, and exercising any art, mystery, or manual occupation

Apprentices.

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pation there, may retain the son of a freeman, not occupying husbandry, nor being a labourer, and inhabiting in the same, or in any other city or town corporate, to serve and be bound as an apprentice, after the custom and order of the city of *London*, for seven years at the least, so as such apprenticeship do not expire before the apprentice shall be twenty-four years of age. *f. 26.*

But no person dwelling in any city or town corporate, being a merchant, mercer, draper, goldsmith, ironmonger, imbroiderer, or clothier, shall take any apprentice except he be his son, or else that the father and mother of such apprentices shall have an estate of inheritance or freehold of 40 s. a year, to be certified under the hands and seals of three justices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there. *f. 27.*

And the reason of this (*Mr. Dalton* says) seems to be, for that such as are to be bound apprentices in towns corporate, if their parents be of a competent livelihood, then their masters shall be not only better secured, but such apprentices also in likelihood, shall have the better means to set up their trades after their times expired. And concerning such, whose parents have not 40 s. a year, they are fitter to be bound apprentices to husbandry, and the like, in the country. *Dalt. c. 58.*

But by reason of the great alteration in the value of money since that time, this provision is become of little use, for an estate of 40 s. a year then, was equal to more than 10 l. a year now.

But the citizens of *London* and *Norwich* may take and have apprentices, as before this act. *5 El. c. 4. f. 40.*

Every person being an hopsholder, and twenty-four years old at the least, and not occupying husbandry, nor being a labourer, dwelling in any market town not corporate, and exercising any art, mystery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying husbandry, nor being a labourer, inhabiting in the same or any other such market town in the same shire. *f. 28.*

In trades in
market towns
not corporate.

But no person dwelling in any such market town, being a merchant, mercer, draper, goldsmith, ironmonger, imbroiderer, or clothier, shall take any apprentice except he be his son, or else that his father and mother shall have an estate of inheritance or freehold of 3 l. a year, to be certified under the hands and seals of three justices of the shire where the lands lie, to the head officer of such

market

market town where such apprentice shall be taken, there to be inrolled of record. *f. 29.*

In any place.

Any person using the art of a smith, wheelwright, ploughwright, millwright, carpenter, rough mason, plasterer, sawyer, limeburner, brickmaker, bricklayer, tyler, slater, helier, tyle-maker, linen-weaver, turner, cooper, miller, earthen potter, woollen weaver weaving household cloth only, fuller otherwise called tucker or walker, burner of oare and woad ashes, thatcher or shingler, wheresoever he shall dwell, may take the son of any person as apprentice, albeit his parents have no land. *f. 30.*

Seamen.

Every owner of a ship or vessel, and every household exercising the trade of the seas by fishing or otherwise, and every gunner commonly called a cannoneer, and every shipwright may take apprentices for ten years or under; and every apprentice so taken, being above seven years of age, shall be by the same covenants bound, or ordered and used to all intents, according to the custom of *London*, so that the covenant or bond of apprenticeship be made by writing indented, and inrolled in the town where the apprentice shall be inhabiting, if it be a town corporate; if not, then in the next town corporate: For which inrollment shall be paid not above 12d. *5 El. c. 5. f. 12.*

Number restrained.

Every person that shall have three apprentices in any the crafts of a clothmaker, fuller, sheerman, weaver, taylor, or shoemaker, shall keep one journeyman; and for every other apprentice above three, one other journeyman, on pain of 10 l. half to the king, and half to him that shall sue in the sessions or other court of record; or if it is in a town corporate, then to be applied as by the charter. *5 El. c. 4. f. 33.*

No hatmaker shall have above two apprentices at one time, nor those for any less term than seven years, on pain of 5 l. a month, half to the king, and half to him that shall sue in any court of record: But this not to extend to his own son, in his own house, so as he be bound by indenture for seven years, and his term not to expire before he be twenty-two years of age. *1 J. c. 17. f. 3. 5.*

Weavers of stuffs in *Norfolk* and *Norwich*, that shall employ two apprentices, shall also employ two journeymen; and no master shall have above two apprentices, or any week boy, to weave in the said trade; on pain of 5 l. a month to the king. *13 & 14 C. 2. c. 5. f. 18.*

11. Who

II. Who are compellable to be bound apprentices.

If any person shall be required by any householder using half a plowland at least in tillage, to be an apprentice and to serve in husbandry, or in any other art, mystery, or science before expressed, and shall refuse so to do, then on complaint of such housekeeper to one justice (or head officer) he shall send for the person refusing; and if he shall think the said person meet to serve, and such person refuse to be bound, he may commit him to ward, there to remain until he be contented, and will be bound. Who shall be bound.
5 El. c. 4. f. 35.

But no person shall be bound to enter into any apprenticeship, other than such as be under the age of twenty-one years. At what age.
Id. f. 46.

Upon the whole, the aforesaid directions about the value of the parent's estate, and such like, are become entirely obsolete, and of no use, and therefore had better be repealed. The restrictions were originally intended (as appears by the statute, *9 H. 4. c. 17.*) for the encouragement of husbandry, by reason of the scarcity of labourers in ancient time. And this statute of the *5 Eliz.* is only a re-enacting, as it were, of former statutes; and expresseth, that any person being an householder may take apprentice the son of any freeman, *not occupying husbandry, nor being a labourer.*

III. Binding.

One cannot be bound an apprentice without deed. 1 Binding to be by deed.
Salk. 68.

2. And by the *5 El. c. 4.* it must be by deed indented. And indented.
f. 25.

M. 1 G. 2. Smith and Birch. An action was brought against the defendant, for enticing away and detaining the plaintiff's apprentice, who had agreed by writing to serve the plaintiff for seven years. Upon evidence it appeared, that the style of the writing began, *This indenture, &c.* but in fact the parchment was not indented, but was a deed poll. On exception taken to the deed, it was insisted that the young man was not an apprentice, because he was not bound by an indenture. An infant can be bound no other way than as the statute of *5 El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be a forgery. Therefore unless the plaintiff shews the apprentice to be
of

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of full age at the time of signing such deed, he cannot be accounted his apprentice, and by consequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his servant by his deed, for he has declared for an apprentice, and must prove him so to be. Therefore the plaintiff was nonsuited. 1 *Sess. Ca.* 222.

But with respect to settlements, it is enacted by the 31 *G. 2. c. 11.* that the apprentice may gain a settlement under such writing, altho' it shall not be indented.

And by the
name of an ap-
prentice.

And an apprentice must be retained by the name of an apprentice expressly, otherwise he is no apprentice, tho' he be bound. *Dart. c.* 58.

Binding other-
wise, void.

And all indentures, covenants, promises, and bargains, for having or taking apprentices otherwise than by the statute of 5 *El.* shall be clearly void in the law to all intents and purposes; and every person that shall take any apprentice contrary to the said act, shall forfeit 10 *l.* half to the king, and half to him that shall sue in the sessions, or other court of record; or if it is in a town corporate, then to the use of such town as by the charter. 5 *El. l. 4. s.* 41.

Stamp.

By the several stamp acts, the binding (except it be of parish apprentices) shall be on a 7 *s.* stamp; and the same shall not be given in evidence in any court till it be stamped, and the duties paid.

Additional
stamp.

And by the 8 *Ann. c. 9.* Beside the said stamps and duties, there shall be paid the duty of 6 *d.* for every 20 *s.* of every sum of 50 *l.* or under; and the duty of 1 *s.* for every 20 *s.* of every sum above 50 *l.* given with any apprentice; and proportionably for greater or lesser sums; to be paid by the master. *s.* 32.

And where any thing, not being money, shall be given with such apprentice, the duties shall be answered for the value thereof. *s.* 45.

But this shall not extend to any apprentice, put out at the common charge of any parish or township, or out of any publick charity. *s.* 40.

And in the case of *K. v. Leighton*, *T.* 32 *G. 3.* it was determined, that a covenant of the parent or friends of an apprentice to maintain him, or find him cloaths during the term, is not liable to any additional stamp duty. *Durnf. and East*, 4 *V.* 732 (a)

(a) See this case more at large, title *Doods*. Settlement by apprenticeship.

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And the full sum shall be inserted in the indenture in words at length, and shall bear date on the day of the execution thereof; on pain that the master shall forfeit double, half to the king, and half with full costs to him that shall sue. *f. 35.*

And no such indenture shall be given in evidence in any suit to be brought by any of the parties thereunto, unless such party on whose behalf the same shall be given in evidence, do first make oath, that to the best of his knowledge, the sum therein inserted was really and truly all that was directly or indirectly to be given with such apprentice, *f. 43.*

The said indentures, within the bills, shall be brought to the head office to be stamped with a stamp for that purpose, and the duties paid within one month after date. *f. 36.*

And elsewhere shall be brought either to the head office within the bills, or to a collector of the stamp duties out of the said limits, in two months after date, and the duties thereupon shall be paid, and the indenture stamped, if it be at the said head office; otherwise such collector shall indorse on the indenture, a receipt for the duties in words at length, and subscribe his name thereto. *f. 37.*

And if it is within 50 miles of the limits of the bills of mortality, the indenture shall within three months after date, and elsewhere within six months, be brought to the head office to be stamped. *f. 38.*

And all such indentures wherein shall not be inserted the full sum directly or indirectly given, or whereupon the duties shall not be paid, or which shall not be stamped within the time limited, shall be void, and not available in any court or place, or to any purpose whatsoever; and the apprentice shall be incapable of exercising the said trade. *f. 39.*

Moreover, by the 9 *Ann. c. 21.* If the master shall neglect to pay the duties within the time limited, he shall forfeit 50*l.* half to the king, and half with full costs to him who shall sue. *f. 66.*

And by the 18 *G. 2. c. 22.* If he shall neglect to pay the same as aforesaid, he shall, besides all other penalties, forfeit double duty. *f. 23, 24.*

And by the 20 *G. 2. c. 45.* If any master, having forfeited the double duty, shall pay the same, and tender the indenture to be stamped, within two years after the determination of the apprenticeship, and before suit hath been commenced for the penalties, the indenture shall be valid, and the penalties discharged. *f. 5.*

And

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And if after the master shall have forfeited the double duty, the apprentice shall in the presence of, or by writing under his hand signed in the presence of one witness, require his master to pay the same, and the master shall not do it in three months, and such apprentice shall at any time within two years after the determination of his apprenticeship, pay the double duty, he may in three months after such payment demand of his master double the sum contracted for in the indenture, and if not paid in three months after, may recover the same by action at law, with full costs. And the apprentice immediately after payment of the said double duties (if his apprenticeship shall not be then expired) and signifying by writing under his hand, that he desires to be discharged from his apprenticeship, shall be discharged accordingly, and shall have the same benefit of the time he hath served as he would have had in case he had been assigned, or turned over to a new master.

f. 6, 7.

And where any prosecution shall be commenced against the master for the penalties, if the apprentice shall pay the double duty at any time in two years after the end of his apprenticeship, he may thereupon exercise his trade, and the indenture shall be valid, and may be given in evidence. f. 8.

Finally, by the 5 G. 3. c. 46. Every chamberlain and other proper officer of every city and corporate town, and company, where any clerk or apprentice or servant obtains his freedom by servitude, shall enter in a book to be kept for that purpose, the names of all such clerks, apprentices, and servants, as shall be put out within the jurisdiction of such city or town corporate, and also the names and places of abode of the masters or mistresses, and of the sums of money, (but it is not said, *or other things equivalent*) given or contracted for, and the trade or profession which they are to learn; and the date of the indentures: on pain of 20 l. half to the king, and half to him that shall sue in any court of record, with full costs. f. 18, 41.

And all printed indentures shall have the following memorandum printed under the same; viz. " The indenture, " covenant, article, or contract, must bear date the day " it is executed; and what money or other thing is " given or contracted for with the clerk or apprentice, " must be inserted in words at length; and the duty " paid to the stamp office, if in *London*, or within the " weekly bills of mortality, within one month after the " execution, and if in the country, and out of the said " bills

" bills of mortality, within two months, to a distributor
 " of the stamps or his substitute; otherwise the inden-
 " ture will be void, the master or mistress forfeit 50 l.
 " and another penalty, and the apprentice be disabled
 " to follow his trade, or to be made free." And if
 any printer, stationer, or other person, shall sell or cause
 to be sold any such indenture, without such memorandum
 being printed under the same; he shall forfeit 10 l. in like
 manner. *f. 19.*

And for the relief of persons who, through neglect or
 inadvertency, have omitted to pay the duty upon money
 or other valuable consideration given, paid, contracted
 or agreed for, with or in relation to any clerk, appren-
 tice, or servant, placed with any person to learn any pro-
 fession, trade, or employment, to have the indenture or
 agreement stamped within the time limited; or who have
 omitted to insert in words at length, in such indenture
 or writing, the full sum or other valuable consideration
 received or paid: It is enacted, that on payment of dou-
 ble the said duty, on or before the 25th day of *December*
 1780, such indenture or other writing may be stamped,
 and the same shall be good, and may be given in evidence
 in any court. And all such persons may exercise their
 respective trades, as if the said duties had been fully paid.
 And every person who hath incurred any penalty by such
 neglect or omission, shall be acquitted; except where pro-
 secutions are depending. 29 G. 3. c. 40. *f. 7.*

Indentures may
 be stamped after
 execution, on
 paying double
 duty.

[N. B. There is generally a clause of indemnity in
 some act of parliament almost every year, giving further
 time to provide admissions of officers in corporations duly
 stamped, and to file affidavits of the execution of the in-
 dentures of clerks to attorneys and solicitors, the last of
 which is the 35 G. 3. c. 50. *f. 8.*]

It seems clearly agreed, that by the common law in-
 fants, or persons under the age of 21 years, cannot bind
 themselves apprentices, in such manner as to intitle their
 masters to an action of covenant, or other action, for de-
 parting the service, or other breaches of their indentures:
 which makes it necessary, according to the usual practice,
 to get some of their friends to be bound for the faithful
 discharge of their offices, according to the terms agreed
 on. *Bac. Abr. Master and Servant.*

Infant bound
 tho' a, &c. &c.

But by the statute of 5 *El. c. 4.* Forasmuch as there
 hath been some doubt, whether any person under 21 years
 of age, and bound to serve as an apprentice, in any other
 place than the city of *London*, shall be bound, accepted,
 and

and taken as an apprentice; it is enacted, that every such person who shall be bound by indenture, to serve as an apprentice, in any art, science, occupation, or labour, according to this statute, albeit he be within the age of 21 years, shall be bound as amply to every intent, as if he were of full age at the time of making the indentures. *s. 42, 43.*

But this is to be understood of a compulsion by the means prescribed by the statute; for altho' an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of this statute, a covenant or obligation of an infant for his apprenticeship shall bind him, but if he misbehave himself, the master may correct him in his service, or complain to a justice to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant. *Cro. Car. 179.*

T. 17 G. 3. K. and Evered. Two justices committed *Robert Collehall* for running away from his master; the case was, he had been bound an apprentice when an infant for 6 years by indenture, and being now of age ran away, alleging afterwards that he did so with an intent to avoid the apprenticeship made when he was an infant, and to his prejudice: he had run away twice before. Two objections were taken; first, that the binding was only for six years, and the 5 *Eliz.* requires it to be for 7; the other was, that an infant could make no contract but such as was voidable, though for his benefit; and *K. v. St. Nicholas in Ipswich (a)* was cited, where it was adjudged, that such an indenture was voidable by the parties; that in the present case, the apprentice had done every thing in his power to avoid the indenture, having left his master, and said he would live with him no longer. In answer thereto, it was insisted, that the apprentice who had submitted to the indenture as long as he had benefit from it, and till he had learned his trade, should not be permitted to desert his service as soon as he became useful in it; but that the contract at the time of its commencement, which was during infancy, (the time when almost all apprenticeships are entered into,) was beneficial to the infant, and might legally be made, and therefore could not be abandoned. *L. Mansfield*: It has been adjudged that an infant may bind himself for his own benefit, and it is settled in the case in 2 *Str.* 1066. *S. C.* that a binding for 4 years

(a) See *Settlement by apprenticeship*, tit. *Woods*.

gives a settlement. — *Allen J.* Supposing the indentures voidable, I cannot conceive that the apprentice's running away can avoid them; had he served regularly, and during such service declared his intention to depart, it might have been different; here he would make use of his offense in order to avoid the punishment that attends it; but it is too late to do it before a justice when charged with a crime. — *Willes and Ashurst J's.* agreed. *Cal. Cas.* 26.

But if his father, or other person, doth covenant for him; such covenant shall bind the father, or such other person: as in the case of *Whitley and Loftus*, *M. 10 G. 2.* In the indenture of apprenticeship, the father covenants to pay the apprenticeship money; the son covenants to account for his master's goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants and agreements therein. By the court: The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted that the covenants may be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. *8 Mod.* 190.

So in the case of *Branch and Ewington*, *M. 21 G. 3.* On an action of covenant by the master against the father of the apprentice, the indenture was in the common form of the statute, the master covenanting to find the apprentice meat and lodging, the father to find him cloaths and washing, and the apprentice that he would serve faithfully; and for the true performance of all and every the said covenants, each of the said parties bound himself to the other. The breach assigned was, that the apprentice had absented himself from the service. — For the father it was contended, that the parties were only bound for the express covenants which they had severally entered into. That it would be absurd to construe the general words so, as to render the father liable for breaches of such of the covenants as were to be performed only by the son. The same construction would render the father liable to the son, or the son to the father, for those which the master was to perform. In all covenants the intention is to govern. The master has other remedies besides an action of covenant against the apprentice if he absent himself: He may,

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by application to the justices, have him punished under the statute of *Elizabeth*; or if he wants compensation for the loss of service, he may compel him to make it up by subsequent service under 6 G. 3. c. 25.—*L. Mansfield* stopped the counsel who was to have argued on the other side, and said, nothing was clearer than that the father was bound for the performance of the covenants by the son. *Douglas*, 500.

Infant bound when under age is entitled to be discharged at 21.

T. 34 G. 3. Ex parte *Mary Ann Davis*. An *habeas corpus* was moved for to bring up this person, that she might be discharged from certain indentures of apprenticeship entered into between herself and *Edward Whitehouse* Esq. whereby she bound herself to him as an apprentice for 7 years, being therein described as aged 14 years, but in fact being upwards of 17 at the time of binding, and being now upwards of 21; the indentures still subsisting. This application was grounded upon the principle that infants cannot be bound beyond 21, but that they may dissent after they arrive at that age.—*L. Kenyon* Ch. J. It is clear that the apprentice must be discharged. Every indenture of an infant is voidable at his election; and in such cases the master must trust to the covenant of those who engage for the infant. But where the binding is under the authority of an act of parliament, that takes away the power of electing to vacate the indentures. But I know of no act which prohibits the party in a case like the present to make such election upon her coming of age. According to the argument of the counsel against the rule, an infant who improvidently bound himself till the age of 50 or upwards, would be bound to serve till that time; but it is impossible to support such a proposition. This apprentice ought not to have been bound longer than till she was 21, and we ought now to discharge her. The other judges concurred. *Durnf. and East*, 5 V. 715.

And as an infant may be bound by indenture, so the apprenticeship may be determined by consent of all the parties concerned; which, in the case of parish poor children, includes the parish officers; in other cases, the father (or guardian), master, and infant. *Burr. Sett. Cas.* 562, 766: *K. v. Justices of Devonshire* (a).

Where a master receives money of an apprentice of full age to vacate his indentures, the relation is dissolved, though the indentures remain uncanceled. T. 17 G. 3. *K. v. Justices of Devonshire*, *Cal. Cas.* 32.

(a) See *Removal*, tit. 1301.

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But a covenant between the master and a third person, the infant not being party, maketh not an apprenticeship. 2 Salk. 479. *K. v. Inhabitants of Fleet (a)*.

If an apprentice is bound, it is not necessary to the validity of his indenture, that the master should sign a counter-part. *T. 17 G. 3 Cal. Cas. 31*. This was the case of a poor apprentice.

IV. Binding of poor apprentices.

The churchwardens and overseers, or the greater part of them, by the assent of two justices (1 Q.), may bind (A) any such children, whose parents they shall judge not able to maintain them, to be apprentices where they shall see convenient, till such man child shall come to the age of 21 (18 G. 3. c. 47.), and such woman child to the age of 21 or marriage; the same to be as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or her self. 43 El. c. 2. s. 5.

By the assent of two justices] *T. 29 G. 3. K. v. Hamstall Ridware*. Anne Craddock was bound by indenture by the parish officers of *Rudgley* apprentice to *Susannah Cotton* of the same place, who assigned her by deed to *S. Walker* of *Hamstall Ridware*, with whom she resided there under the indenture for more than 40 days and until his death, when she was removed by two justices from *Hamstall Ridware* to *Rudgley*. The indenture was separately assented to by two justices, by signing the same, but the two justices did not assent to or sign the same at the same time, or in the presence of each other. The sessions quashed the order of removal. *Beacroft and Sayer*, in support of the order of sessions, admitted that wherever the magistrates are to exercise a judgment upon the subject, it is necessary they should meet, in order that their act may be the result of their joint opinion; as in making orders of removal, orders of filiation, and appointing of overseers; but contended that where the justices act only ministerially as allowing a poor rate, they may act separately, and that the assent of the justices in the present case fell within the latter description. The words in 43 El. c. 2. s. 1. by which the parish officers, by and with the consent of two justices, are directed to raise competent sums for the relief of the poor, are nearly similar to those in the 5th s. of

The two justices in assenting to an indenture are to be together.

(a) See *Settlement by Apprenticeship*, tit. 3002.

Power to take.

And all persons, to whom the overseers shall by the 43 *El.* bind any children apprentices, may take and keep them as apprentices. 21 *J. c.* 28. 3 *G. c.* 4. *f.* 22.

Indenture to be stamped.

By the several stamp acts, the indenture must be on a sixpenny stamped piece of paper or parchment; but it is exempted from the additional stamps and duties for money given with the apprentice.

Proviso to be inserted in indentures, in case the master should die.

And by 32 *G. 3. c.* 57. after reciting, that in indentures of parish apprentices, it hath been usual to insert several agreements and covenants to be done and performed by the several parties thereto, and amongst other things, that the master shall, during the term of such apprenticeship, find and allow to such apprentice, sufficient meat, drink, apparel, lodging, and all other things needful for an apprentice; It is enacted, that in all parish indentures which shall be made after 1st *July* 1792, where no more than 5 *l.* shall be given with such apprentice, there shall be annexed to the covenant in such indentures for such maintenance as aforesaid, a proviso (B) declaring, that such covenant shall not be made to continue and be in force longer than three calendar months next after the death of such master, in case he shall die during the term of such apprenticeship; and in case such proviso be omitted in such indenture, the covenant for maintenance shall be in force for no longer time than three calendar months next after the death of such master, any thing in any such covenant to the contrary notwithstanding. *f.* 1.

Persons refusing to take.

And where any poor child shall be appointed to be bound apprentice by the 43 *El.* the person to whom he is appointed to be bound, shall receive and provide for him, and also execute the other part of the indentures; and if he shall refuse so do, oath being thereof made by one of the churchwardens or overseers, before two justices, he shall forfeit 10 *l.* by distress and sale, by warrant (C) of such justices, to the use of the poor; saving always to the person to whom any poor child shall be appointed to be bound apprentice, if he shall think himself aggrieved thereby, his appeal to the next sessions, whose order therein shall be final. 8 & 9 *W. c.* 30. *f.* 5.

Who are compellable to take.

And as the churchwardens and overseers have power to place out poor children, therefore they are proper judges of persons who are fit to be their masters; and those are, all persons, who by their profession or manner of living, have occasion to keep servants; but the same are to be approved of by the justices, and if such master is dissatisfied, he may appeal to the sessions. *Dalt. c.* 58.

T. 13 *W. Minchamp's* case. Two justices bound an apprentice to a *merchant*: He appealed to the sessions, and the order was discharged. And now the court, on consideration of the matter, confirmed the order of sessions; because the act having made persons compellable to take apprentices, and given an appeal to the sessions, it was in the discretion of the justices at sessions to determine, whether it was or was not fitting to put an apprentice upon any one; and therefore the court would not disturb what the sessions had done, but confirmed the order. 2 *Salk.* 491.

M. 12 G. 3. *K. and Botley*. The parish officers of *Botley* appointed an apprentice to be bound to *Edward Clowerley*; who appealed to the sessions. The sessions discharge the appointment, and state the case specially: That it appears to them upon the evidence, that *Edward Clowerley* resides in the parish of *Hound*, but is owner and occupier of an estate in the parish of *Botley*, of the yearly value of 30l. upon which there is an house inhabited by a weekly labourer of the said *Edward* for the better managing the farm: That the said *Edward* did not reside or lodge in the said parish of *Botley*, but paid church and poor rates for the premises: That a very considerable part of the lands of *Botley* is occupied by persons residing in other parishes.—In support of the order of sessions, it was contended that the sessions have a discretionary power to judge of the fitness or unfitness of binding apprentices to particular persons; and having by their determination declared, that *Clowerley* ought to be relieved from the apprentice, they had determined the question, and the court could not enquire any question of law about it. It was suggested, that the only question agitated at the sessions and intended to be referred to this court was, whether occupiers of land, not living within the parish where the land lies, are bound by law to take apprentices.—And it not appearing in the state of the case, whether the sessions had determined on the unfitness of that particular person, or on the point of law in general, of his not being liable in respect of his living out of the parish, *L. Mansfield* said that there was no coming at the point on that state of the case by the sessions; but he thought, if they had determined it on the latter ground, they had done very right. *Mr. J. Aston* was of the same opinion, and observed how hard it might be to bind an apprentice on a person occupying lands in one parish, and being a housekeeper in a very distant parish. *Mr. J. Willis* assented. And the rule for quashing

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quashing the order of sessions was discharged, and the sessions order confirmed. *Bott.* 389. *Lofft.* 79.

H. 29 G. 3. K. v. John Clapp. The parish officers of *Sewton, Devon*, having, with the assent of two justices, apprenticed *Sarah Hellier*, a poor child of *Sewton*, to the defendant according to the statute; he appealed to the sessions, who confirmed the order, subject to the opinion of the court on the following case.—The apprentice was bound (*prout* the indenture) to the appellant, who resided in the parish of *Pinhoe*, on an estate which he rented and occupied in the parish of *Sewton* of 20*l.* *per ann.* which was divided by the highway from the house in which he lived. There was no house on the estate of which he was the occupier. The indenture, together with the apprentice, was tendered to the appellant in the parish of *Sewton*, in the highway adjoining to the said estate lying in the parish of *Sewton*.—*East* argued in the support of the order of sessions: And *Fanshawe* and *Clapp, contra.*—*L. Kenyon, Ch. J.* It is highly fit that this question should not remain any longer undecided. I remember a much older case than either of those mentioned at the bar, in which this question was discussed, but not decided. The question arises on the 5th *sec.* of 43 *Eliz. c. 2.* The general purview of that statute was to make a provision for the maintenance of the poor; and the first clause, in mentioning those who are to contribute to such maintenance, describes two sorts of persons, namely, *inhabitants* and *occupiers of lands, &c.* Amongst other provisions for the poor, the 5th *f.* gives power to the parish officers, with the assent of two magistrates, to bind poor children apprentices *where they shall see convenient.* It is true indeed that those words cannot be taken so generally as they purport, because they cannot compel mere strangers, who stand in no relation to the parish, to take such apprentices. But I think that the context of the statute furnishes the means of circumscribing the general extent of those words: and that context I take from the first clause, which imposes other burdens of the same nature on *occupiers of lands, &c.* as well as inhabitants. The general object of the act was to compel all those, who had any property in the parish, to contribute their due proportion towards the maintenance of the poor, and the receiving apprentices is one mode of contributing to their general relief. In construing these words, I see no reason for confining the power of binding to the *inhabitants* of the parish; they ought to be extended to persons *occupying lands in the parish, though residing*
out

out of it. Then it is said that if this construction be put upon the statute, the party may be doubly charged; in the parish where he lives in respect of his inhabitaney; and in that in which he has lands, in respect of his occupation of them. But if he find himself aggrieved, he may appeal to the sessions; and we must take it for granted that the justices will do what is right. They are to adapt the charge to the size of the property which the person charged possesses; and these are incidental charges which fall on him in respect of that property. I remember it was argued in a former case on this subject that, if this construction of the statute were to prevail, some parishes would disburden themselves of many of their poor by apprenticing out their poor children to persons living out of the parish: but the answer to any such argument is that, at the time when the 43 *Eliz.* was passed, the 13 & 14 *C. 2.* was not in existence. However, the ground of my decision here is, that this is one of the modes provided for the maintenance of the poor in this statute, which imposes the duty in respect of the property.—The other judges concurred. Order of sessions confirmed. *Durnf. and East*, 3 *V.* 107.

And by 32 *G. 3. c. 57.* Where any parish apprentice shall have been discharged for misbehaviour in the master, and such master shall have been convicted of such offence on indictment, or action at law, the churchwardens and overseers shall not bind any other apprentice upon such person; but that when he ought or would be compellable to take a parish apprentice, two justices, on application by such churchwardens and overseers, may order that such person shall pay into the hands of such churchwardens and overseers, any sum not exceeding 10*l.* nor less than 5*l.* for the purpose of binding out such child (intended to be bound) an apprentice, with the approbation of such justices; and on his refusing payment thereof, such justices may levy the same by distress, together with the reasonable expenses of such distress. Provided that any such master, from whom any such apprentice shall be discharged by virtue of 20 *G. 2. c. 19.* may appeal against such discharge, or order for the payment of any money in consequence thereof as aforesaid, or in lieu of a subsequent binding by virtue of this act, to the next sessions, who shall finally determine the same, and in their discretion allow to all parties their reasonable costs. And no such distress for enforcing the payment of such money last mentioned, shall be taken until after the next general quarter sessions next after such

Master having been convicted of misusing his apprentice, not to have another put upon him, but to pay not exceeding 10*l.* nor less than 5*l.*

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order shall be made, in case the person ordered to pay the same shall, within seven days after notice given to him of such order, give notice to such churchwardens and overseers or one of them, of such intended appeal; and if he shall not appear at such sessions in support of his appeal, then 40 s. shall be added to the expences of distress before directed to be taken and levied accordingly. *f. 12.*

A master is not compellable to give to his apprentice forced upon him, wages or cloaths at the end of the term.

E. 13 Ann. 2, and Wagstaff. It was moved to quash an order to compel a person to take an apprentice, because in the close of the indenture it was said that the master, at the end of the term, shall give his apprentice two suits of cloaths. Upon debate, the court held this to be ill; for the justices during the term of his apprenticeship cannot order him wages, they must only order him a maintenance as an apprentice, and cannot order him any thing after the term is ended. So the order was quashed. *Foley 205. 1 Sess. C. 48.*

Apprentices forced upon masters, may be assigned with the consent of two justices.

And by 32 G. 3. c. 57. After reciting, that it frequently happens, that persons are compellable by 9 and 10 W. to take a greater number of parish apprentices than it is convenient for them to maintain or employ in their own families, and are therefore forced to place out or assign over such apprentice, to other persons; and it is proper that such assignment should be legally made, under the inspection and controul of the magistrates, as well for the benefit of the apprentice, as that the original master may be discharged from his covenants in respect of such apprentice; and it is fit that such apprentice and the person to whom he is so assigned, should be made subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; It is enacted, that any such master as aforesaid, by indorsement on the indenture, or by other instrument in writing, with the consent of two justices of the place where such master shall dwell, testified under their hands, may assign such apprentice for the residue of the term, to any person who is willing to take him. Provided, that such person shall, at the same time, by indorsement on the counter-part of the indenture, or by writing under his hand stating the said indenture, and the indorsement and consent aforesaid, declare his acceptance of such apprentice, and acknowledge himself, his executors and administrators, to be bound by the agreements and covenants mentioned in such indenture (which may be in the form or to the effect as at letters R and S), and in such case such apprentice shall be deemed and taken to be the apprentice of such subsequent master, and so from time to time

as often as it shall be convenient for any such subsequent master to part with any such apprentice; and all justices shall have the like power with respect to such subsequent masters and apprentices as they shall then have by any law for the regulating parish apprentices. *f. 7.*

And whereas no express provision has been made for the discharge of any such parish apprentice from a master who is become insolvent, or so far reduced as to be unable to employ or maintain such apprentice; it shall be lawful for two justices where such master shall live, on request of such master that such apprentice may be discharged for the reasons aforesaid, to enquire into the matter of such allegations, and to discharge such apprentice, in case they shall find the same to be true. *f. 8.*

Justices may discharge apprentices, where masters cannot employ or maintain them.

Provided that nothing herein shall extend to any parish apprentice with whom more than 5*l.* shall be given, but the same shall remain subject to the like rules and regulations as if this act had not been made. *f. 9.*

Not to extend to apprentices with whom more than 5*l.* shall be given.

Provided also, that no indorsement made in pursuance of this act, shall be chargeable with any stamp duty; and no such other instrument or writing herein directed to be made, shall be chargeable with a higher stamp duty than parish indentures of apprenticeship. *f. 10.*

Stamp duty.

In hundreds or other districts incorporated by particular acts of parliament for relief of the poor, where, by such acts, power is given to bind poor children apprentices; the respective persons, to whom they shall be appointed to be bound, shall receive and provide for them according to the indentures to be executed by the directors and acting guardians, and shall execute the counterpart of such indentures: And if any person shall refuse to receive such apprentice, or to execute such counterpart of the indenture; he shall, on conviction on the oath of one of the said directors or acting guardians, or other credible witness, before two justices, forfeit 10*l.* to the poor within such incorporated district, to be levied by distress. Saving always to such person his appeal to the next sessions, whose order therein shall be final — And provided, that nothing herein shall extend to compel any person to take any such poor child apprentice, unless he be an inhabitant and occupier of lands in the parish to which such child belongs. 20 G. 3. c. 36.

Binding in incorporated districts.

Unless he be an inhabitant and occupier] H. 30 G. 3: K. against the directors and guardians of the poor within the hundreds of *Tunstead* and *Hopping* in *Norfolk*. Incorporated by 25 G. 3. c. 27. The directors, under the powers

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powers given them by that act, bound a poor male child apprentice to one *Reynolds* who was an occupier of land, but not an *inhabitant* within the said hundreds. He appealed to the sessions; who were of opinion that he was not bound to receive the apprentice, because he was not an inhabitant as well as an occupier.—But the court of K. B. said, that incorporated districts under particular statutes, were to be governed as to binding out apprentices, by the same rule as other places. That for some purposes, *inhabitants* and *occupiers* are synonymous terms; that where a person derives a benefit from property which he occupies in a parish, he is liable to contribute to the ease of it. If indeed the legislature had used imperative words, the court must have been bound by them, but there are none such in this statute. Order of sessions quashed. *Durnf. and East*, 3 V. 523.

V. Money given to bind out poor apprentices.

By the 7 *J. c.* 3. All money given by any person to be continually employed for the binding out apprentices, shall be employed in manner following, unless otherwise ordered by the givers; *viz.* All corporations of cities, boroughs, and towns corporate, and in places not corporate, the minister, constables, churchwardens, overseers, or the most part of them, shall have the nomination and placing of such apprentices, and ordering of such money; and if they shall not employ the same accordingly, every person offending shall forfeit 1 l. 6 s. 8 d. half to the poor, and half to him that shall sue. *f. 2.*

And the master that shall receive the money, shall be bound with one or two sureties in double the sum, unto such corporation, or to the other persons appointed by this act in places not corporate, to take care of it, on condition to repay it at the end of seven years, or within three months thereof; and if the apprentice shall happen to die within the seven years, then within one year after such death, and if the master shall die, then within one year after such master's death. *f. 3.*

And the said money shall always be put forth in three months after it shall come to the said parties hands; and if there are not then fit persons to be bound apprentices, within the places where the money is given to be employed, it shall be disposed of for binding some of the poorest children of any adjoining parish. *f. 4.*

And

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And choice shall always be made of the poorest children ; and no such apprentice shall be above 15 years of age when bound. *f. 5.*

And the said persons in places not corporate, shall yearly within a month after *Easter*, account to their successors before two justices dwelling in or next to the place. *f. 6.*

And if any of the trustees shall break their trust, or commit any offence for which no penalty is given by this act ; any person may petition the lord chancellor, who may issue a commission to hear and determine the same, and may levy the money misemployed upon such defaulters, or otherwise upon such able inhabitants of the place, as they shall think fittest ; and persons aggrieved may appeal to the lord chancellor. *f. 7.*

VI. Binding poor apprentices to the sea service.

It shall be lawful for two justices, and for the head officers in corporations, and for the churchwardens and overseers of the several parishes or townships, with the consent of such justices or head officers, to bind and put out any boy at the age of ten years or upwards, or who shall be chargeable, or whose parents shall be chargeable, or who shall beg for alms, to be an apprentice to the sea-service, to any subject being master or owner of any ship or vessel, until he shall attain the age of 21 years. 2 & 3 Ann. c. 6. *f. 1.* Who may be bound.

And every person to whom any poor parish boy shall be put apprentice by the 43 *El.* may, with the consent of two justices dwelling near the parish where such poor boy was bound, or with the like consent of the chief officer in a corporation, at the request of the master, his executors, administrators, or assigns, by indenture assign over such poor boy apprentice, to any master or owner of a ship or vessel, using the sea-service, during the remaining time of his apprenticeship. *f. 6.*

And every master or owner of a ship, from 30 to 50 Who shall take,
ton burden, shall be obliged to take one such apprentice, and one more for the next 50 ton, and one more for every hundred ton such ship shall exceed the burden of an hundred ton ; on pain of forfeiting 10*l.* to the poor of the parish from whence such boy was bound. *f. 8.*

But no master shall be obliged to take any such apprentice, under 13 years of age, or who shall not appear to be
fitly

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fitly qualified both as to health and strength of body for that service. 4 *An. c. 19. f. 16.*

Age to be inserted in the indenture.

The boy's age shall be inserted in the indenture, being truly taken from a copy of the entry in the register-book (where it can be had), which copy shall be given and attested by the minister without fee: And where no such entry can be found, two such justices, and such head officers, shall as fully as they can inform themselves of such boy's age, and from such information shall insert the same in the indentures. 2 & 3 *An. c. 6. f. 1.*

What money shall be given with him.

And the churchwardens and overseers shall pay down to the master, at the time of the binding, the sum of 50 s. for cloathing and bedding; and the charges by this act appointed shall be allowed on their accounts. 2 & 3 *An. c. 6. f. 2.*

Indentures to be registered.

The churchwardens and overseers shall send the indentures to the collector of the customs at the port whereunto the master belongeth; who shall enter the indenture in a book, and make an indorsement upon the indenture of the registry thereof, subscribed by him, without fee. And if he shall neglect or refuse to enter such indentures, and indorse the same, or make false entries, he shall forfeit 5 l. to the poor of the parish from whence such boy was bound. 2 & 3 *An. c. 6. f. 5.*

Apprentice how conveyed to the port.

Such apprentice shall be conveyed to the port to which his master belongeth, by the churchwardens and overseers, or their agents; and the charges thereof shall be paid as by the vagrant act of 11 & 12 *W. 2 & 3 An. c. 6. f. 10.*

Counterpart to be then executed.

That is to say, out of the gaol and marshalsea money; which by the 12 *G. 2. c. 29.* is directed to be paid out of the general county rate.

The counterpart of the indenture shall be sealed and executed by the master, and attested by the collector of the port, and the constable or other officer who carries the apprentice; which officer shall transmit such counterpart to the churchwardens and overseers of the place from whence the apprentice was bound. 2 & 3 *An. c. 6. f. 11.*

Protection from being impressed.

And the collector or his deputy shall transmit a certificate under his hand, to the commissioners of the admiralty, containing the name and age of such apprentice, and to what ship he belongs; and on receipt of such certificate, a protection shall be made and given *gratis* to such apprentice, till he attain the age of 18 years. *Id. f. 5.*

Also every person who shall voluntarily bind himself apprentice to the sea-service, shall not be impressed for three years from the date of his indentures; which indentures shall be registered, and certificates thereof given and transmitted by the collector as aforesaid; on receipt of which certificates, protections shall be made and given for the first three years without fee. *Id.* *f.* 15.

But by 4 *An. c.* 19. No person of the age of 18 years shall have any protection from being impressed, who shall have been in any sea-service, before he bound himself apprentice. *f.* 17.

But every person not having before used the sea, who shall bind himself apprentice to serve at sea, shall be exempted from being impressed for three years; and the commissioners of the admiralty, on due proof of the circumstances, shall grant a protection accordingly, without fee. 12 *G. 2. c.* 17.

When such parish or voluntary apprentice shall be impressed, or voluntarily enter into the king's service, the owner or master, his executors, administrators, or assigns, shall be intitled to able seamen's wages for such of the apprentices, as shall upon due examination be found qualified for the same, notwithstanding their indentures of apprenticeship. 2 & 3 *An. c.* 6. *f.* 17.

When impressed the master to have the wages.

Such poor boys bound out, or assigned over, to the sea-service, until they shall attain to the age of 18 years, shall be exempted from the payment of 6d. a month to *Greenwich* hospital. *Id.*

Exempted from the 6d. a month.

Every master so obliged to take such apprentice, shall after his arrival into any port aforesaid, and before he clears out of such port, give an account in writing under his hand, to the collector, containing the names and number of such apprentices as are there remaining in his service. *f.* 9.

Master to enter his apprentices on clearing out.

And every custom-house officer shall insert at the bottom of their cocquets, the number of men and boys on board their respective ships at their going out, describing the apprentices by their names, ages, and dates of their indentures, for which no fee shall be taken. *f.* 14.

The same to be inserted in the cocquet.

And the collector in the port shall keep a register, containing the number and burden of all ships belonging to the port, together with the masters or owners' names, and also the names of all such apprentices in such ships, and from what parishes and places they were sent; and shall transmit (*gratis*) true copies thereof signed by him, to the quarter sessions, or to such towns corporate, parishes, or places,

Registry to be kept in the ports.

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places, when and so often as he shall be reasonably required so to do; and every collector refusing or neglecting to send such copy, shall forfeit 5*l.* to the poor of the parish from whence such boy was bound. *f.* 13.

Differences between such masters and apprentices.

Two justices near the port, and mayors of towns corporate, in or near adjoining to such port to which such ship or vessel shall at any time arrive, may determine all complaints of ill usage from the master to such apprentice, and also of all such as shall voluntarily put themselves apprentices to the sea-service, and make such order therein as they are now enabled by law to do, in other cases between masters and apprentices. *f.* 12.

Penalties.

All the penalties aforesaid shall, by warrant of two justices of the county, city, or town corporate, be levied by distress and sale. *f.* 18.

Master dying.

If any master who hath been obliged to take such parish boy an apprentice, shall die, during the term; his widow, or his executor or administrator, may assign over such apprentice to any other master who hath not his complement of apprentices. 4 *An. c.* 19. *f.* 16.

Note, By the 2 *G. 3. c.* 15. Masters, apprentices, mariners, and others employed in fishing vessels upon the coasts, are exempted, during such their employment, from being impressed. *f.* 22, 23, 24, 25.

VII. Differences between the master and apprentice.

Master may chastise his apprentice.

A master may by law correct and chastise his apprentice, for neglect or other misbehaviour, so it be done with moderation: though it doth not seem to be lawful for the master or mistress to beat any other servant of full age. *Lamb.* 127. 1 *Black.* 428.

Whether the master himself can discharge his apprentice.

The master may not of his own accord discharge his apprentice, but if they cannot agree, they may proceed in one of these two ways; either upon the statute of the 5 *El. c.* 4. or upon the statute of 20 *G. 2. c.* 19.

Differences between the master and apprentice by 5 *El. c.* 4.

By the 5 *El. c.* 4. *If any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being aggrieved, and having cause to complain, shall repair unto one justice (D. E.) of the county, or to the mayor or other head officer of the city, town corporate, or market town, or other place where the master dwelleth; who shall by his wisdom and discretion take such order and direction between the master and his apprentice as the equity of the cause shall require: and if for want of good conformity in*
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the master, the said justice (or head officer) cannot compound and agree the matter, he shall take bond of the said master to appear at the next sessions; and on his appearance, and hearing of the matter there, if it be thought meet to discharge the said apprentice, then the justices, or four of them at the least (1 Q.) or the said mayor or other head officer, with the consent of three either of his brethren, or men of best reputation in such city, town corporate, or market town, shall have power, in writing (F) under their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticeship, and the cause thereof: And the said writing, being inrolled by the clerk of the peace, or town-clerk, amongst the records, shall be a sufficient discharge for the apprentice against his master, his executors and administrators. And if the default shall be found to be in the apprentice, then the said justices, or the said mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be administered unto him, as by their wisdom and discretions shall be thought meet. s. 35.

[If any such master] That is, any such master as is before mentioned in this statute, in the trades therein specified; and the former resolutions confined the sense of the statute to such trades only, but the latter adjudications seem to extend the equity thereof to other trades not mentioned in the statute; as in the following instances:

M. c W. K. and Gately. On a certiorari it was moved to quash an order of sessions, for the discharge of one *Edward Green* from his apprenticeship to the defendant *Gately*. The fact was, that *Gately* was a mountebank, and being at a place in *Yorkshire*, where he kept a publick stage, *Green* was by indenture bound apprentice to him in this manner, viz. to *Robert Gately*, surgeon, to learn the trade he now useth; and immediately he went upon the stage, and ever since continued in the employ. After which, being with his master *Gately* in *Middlesex*, he complained to the justices, that his master did not teach him the trade. Upon which they discharged him. This being done, *Green* set up the trade of mountebank himself. It was moved to quash the order, the justices being willing, because they were imposed upon. And the exception was, that the statute of the 5 *El.* in discharging apprentices is confined, and extends only to apprentices mentioned in that clause, and there neither surgeon nor mountebank is mentioned: And tho' a surgeon may be a trade within the statute, which a man cannot exercise without serving an apprenticeship to, because that clause of the statute is general; yet this part of the statute, relating to the discharge of apprentices, extends only to trades there mentioned.

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By the court; The clause relating to the discharge of apprentices is general, and goes to all manner of apprentices; even to those of merchants; but afterwards the court were of opinion, that the power of discharging reaches only to the trades mentioned in the statute, among which a surgeon is not mentioned; for that, tho' as to the serving seven years apprenticeship, a surgeon comes under the general term of arts and misteries, yet the power of discharging reaches only to the trades particularly mentioned. *2 Salk. 471; 2.*

And *M. 12 An. Q. and Furness*. It was held, that the statute extends only to the trades therein mentioned; and therefore not to a glass-bottle maker. *Caf. of S. 29.*

On the other hand in the case of *K. and Collingburn, M. 12 G.* Exception was taken to an order of discharge; that the justices could not discharge the apprentice, because the trade to which he was bound, viz. a glazier, was not within the statute: But not allowed; for though formerly it was held, that the trade ought to be a trade within the statute, yet the latter resolutions have been otherwise. *L. Raym. 1410. Str. 663.*

Shall misuse or evil intreat his apprentice] An apprentice to a surgeon was sent by his master to the *East Indies*: It was adjudged, that the master cannot compel his apprentice to go beyond the sea, except the master go with him; but he may send him to any part of *England*. *13 Jac. Country and Windall. Brownl. 67.*

But otherwise, if it be expressly agreed, or the nature of the apprenticeship doth import it; as if the master be a merchant adventurer, or sailor. *Hobart. 134.*

Evil intreat] *E. 8 G. 2. K. and Eastman*. An apprentice was discharged, the master having *used him unkindly*, and refusing to provide for and entertain him: But by the court, this is not a good ground for the discharge: for there is a power to oblige the master to receive and entertain the apprentice; and *using him unkindly* is too loose. *Str. 1014.*

Or the apprentice do not his duty to his master] *T. 4 G. K. and inhabitants of Hales Owen*. An order reciting that *Joseph Higgin* was bound out by indenture, as the statute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of surgeons incurable, therefore the justices discharge the master from his apprentice. It was moved to confirm the order, because the master cannot now have the end of the binding, which was, the service of his apprentice. But it was answered; that the statute only impowers the justices to discharge for misbehaviour;

viour, and not for sickness. And quashed by the court; for the master takes the apprentice for better and worse, and is to provide for him in sickness and in health. *Str.* 99.

Shall repair unto one justice] Upon an order made at the sessions to discharge an apprentice, it did not appear, that he applied himself to a justice first. And *Holt*, Ch. J. was of opinion, that the justice hath power to make an order, and if obeyed by the matter, then the sessions can have no power; if disobeyed, then the justice upon complaint may bind the master to the sessions, and that the sessions have no power otherwise. 1 *Salk.* 67. •

T. 13 W. K. and Johnson. Exception was taken to an order for discharging an apprentice, that the complaint was made originally at sessions, without any previous application to a single justice out of sessions: *Holt* Ch. J. delivered the opinion of the court, That the order was good; if it had been a new question, he should have held a prior application to some justice out of sessions necessary; but after so many orders affirmed in this court, which have been otherwise, it is too late to unsettle that now. 1 *Salk.* 68.

So also in the case of *K. and Gill*, H. 5 G. It was said by the court,—It hath been so often resolved, that the sessions hath an original jurisdiction, that we will not suffer it now to be made a question, though it might be doubtful upon the statute itself. *Str.* 143.

And, *T. 12 G. K. and Davis.* The court agreed, that it is a point not now to be disputed, that the sessions hath an original jurisdiction to discharge apprentices. *Str.* 704. And by *L. Hardwicke* Ch. J. in the case of *K. & Easman*, E. 8 G. 2. This determination is right: for the application which the act directs to be made to a private justice, seems to mean only to arbitrate and accommodate the dispute. The statute says, if he cannot compound the matter, he is to take bond for the parties appearance at the sessions, so that they are not to take it by appeal. *Cases in the time of L. Hardwicke.* 101.

Or to the mayor or other head officer] *M. 12 G. K. and Collingburne.* An order of sessions was made at *Hicks's Hall*, for the discharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there. And the order being removed into the king's bench, the question was, whether the court of sessions at *Hicks's Hall* hath any jurisdiction to discharge an apprentice to a freeman of *London* (especially as there is a saving in the act, of the custom of the city of *London*); or whether he ought not to be discharged by the mayor's court only. It

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appeared that the apprentice lived with his master out of the city of *London*, and within the jurisdiction of the justices of *Middlesex*. To this exception it was answered, that the statute doth not regard where the binding or inrolling is, but gives the jurisdiction expressly to the justices where the master lives; and if this did not belong to the justices of *Middlesex*, where the master lives, there would be a failure of justice: for neither the chamberlain, nor any other city magistrate, have power to compel the master's appearance before them. The court affirmed the order of discharge, and said they would not take away the jurisdiction of the mayor's court, but only give a concurrent jurisdiction to the justices for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in distant counties, obliged to come up to the mayor's court to get themselves discharged: And the words of the statute are very plain; for they give the jurisdiction to the justices *where the master dwelleth*. Str. 663.

Who shall by his wisdom and discretion take such order and direction between the master and his apprentice as the equity of the case shall require] Hereupon the justice, if he sees cause, may, by consent of the master, discharge the apprentice from his apprenticeship: but this must not be by a verbal discharge; for the apprentice being by deed, cannot be discharged but by deed, that is, by order under the hand and seal of the justice. *Dalt. c. 58. 6 Mod. 182.*

If for want of good conformity in the master.] If the master is dissatisfied, he may have the matter transferred to the sessions: but here is not the like option given to the apprentice; and the reason seems to be, because the apprentice being most commonly an infant, the law presumes that the justice is more capable of judging what is for the infant's benefit.

On his appearance] *E. 13 W. Dutton's case.* It was moved to quash an order made for the discharge of an apprentice. The question arose upon the clause of the statute which directs, that upon appearance of the master, the apprentice may be discharged by four justices, after one justice out of sessions hath endeavoured to compose the matter in difference. And in this case it was objected, that *Dutton*, the master was bound over to appear, and did not; and the justices have but a limited jurisdiction, and it is expressly directed by the act, that the discharge is to be made on the appearance of the master; besides, there is another remedy, to proceed on the recognizance which is forfeited by

by not appearing. By the court: The act must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy; and it would be very hard, that supposing the master is profligate, and runs away, the apprentice shall never be discharged. 2 Salk. 490.

H. 5 G. K. and Gill. An order of sessions for discharging an apprentice was quashed, because it did not set forth, that the master was summoned or did appear. Str. 143.

So also, *E. 8 G. 2. K. and Eafman.* The order was quashed, because it did not appear that the master was present or summoned, which it is plain the act intended he should be. Str. 1013.

Inrolled by the clerk of the peace T. 4 G. K. and inhabitants of *Hales Owen.* The order of discharge was not inrolled; and by the court for that reason held ill. Str. 99.

Shall be a sufficient discharge for the apprentice against his master] But as the justices may discharge the apprentice from his master, for ill usage; so also they may discharge the master from the apprentice for evil and disorderly behaviour. Read. Appr.

Discharge] T. 13 W. K. and *Johnson.* Exception was taken to an order of discharge, that the justices had ordered money to be returned: But by the court, the order is good. And *Holt Ch. J.* said he never doubted of that matter, for it is a power consequential upon their jurisdiction to discharge. 1 Salk. 68.

But in the case of *K. and Vandeleer, M. 4 G.* The justices at the sessions did order an apprentice to be discharged, and that the master having received 5 l. with him, should refund 3 l. as a further provision for him. This was moved to be quashed, because the statute which gives the justices power to discharge, gives them no authority to order any money to be returned. By the court; it is very hard, that if the master misuseth his apprentice, the next day after he is bound, he should pay back nothing if he is discharged: It will be an encouragement to masters to treat their apprentices ill; but the statute being silent, the order must be quashed. Str. 69.

Nevertheless, this doctrine of refunding seemeth now to be established, is founded on great reason, tho' not expressly mentioned in the act; for the justices being authorized to discharge according to their discretions; when the end of the apprenticeship cannot be attained with one per-

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son, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master. 2 *Bac. Abr. Master and Servant*.

And in the case of *K. and Amies, T. 7 G. 2.* it was held, that an order of the master to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money is a necessary proof of the receipt of it; and the justices in their orders are not obliged to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary; and there is a known and established distinction between orders and convictions. *Id.*

In the chancery. *Jan. 22, 1745. Ex parte Sandby.* The petitioner, on the tenth of *Jan. 1744.* was put apprentice to *Ward*, a bookseller at *York*, and the sum of 80*l.* was given with him as an apprentice for 7 years. In *July* following, a commission of bankruptcy was taken out against *Ward*; and being declared a bankrupt, assignees were chosen, who sell off the bankrupt's effects, and he is now the supervisor of the press to the purchaser, and becomes incapable of performing his part of the contract, nor is the petitioner able to raise any money to put him out an apprentice to another master, and the commission being a recent one, probably no dividend may be made in a year, or a year and a half; so that all this time will be lost to the petitioner. Upon these circumstances, the petitioner prayed, that on deducting 10*l.* out of the 80*l.* for his board with the bankrupt during the six months he lived with him, the assignees should be ordered to pay him the sum of 70*l.* out of the effects of the bankrupt already come to their hands, and not oblige him to prove it as a debt under the commission. The lord chancellor *Hardwicke* was at first doubtful, and seemed inclined to grant the petition, but on ordering search to be made for precedents, and several being produced wherein it was directed that apprentices should come in as creditors only, after deducting for the time they lived with the bankrupt, upon the remaining sum; it was ordered accordingly in this case, and that the petitioner should be admitted a creditor for 70*l.* only. 1 *Atkyns. 149.*

Shall cause due correction and punishment to be administered] This being left indefinite, it seemeth most apposite, that the justices commit the apprentice to the house of correction for a time to be kept to hard labour, or otherwise corrected as the nature of the offence may require.

By

By the 20 G. 2. c. 19. On complaint (G) unto two justices, by any parish apprentice, or other apprentice upon whose binding out no larger a sum than 5l. was paid concerning any misuse, refusal of necessary provision, cruelty, or other ill treatment, they may summon (H) the master or mistress, to appear before them at a reasonable time to be named in such summons; and on proof upon oath of the truth of the said complaint (whether the master or mistress be present or not, if service of the summons be also upon oath proved) the said justices may discharge (I) the apprentice by warrant or certificate under their hands and seals, for which warrant or certificate no fee shall be paid. s. 3.

Differences between the master and apprentice by 20 Geo. 2. c. 19. & 32 Geo. 3. c. 57. & 33 G. 3. c. 55.

And by 32 G. 3. c. 57. Where any parish apprentice shall be so discharged, such two justices may order such master to deliver up to such apprentice his cloaths; and also to pay to the churchwardens or overseers of the place to which such apprentice shall belong, any sum not exceeding 10l. to be applied by them, under the order of such justices, for the again binding out such apprentice, or otherwise for his benefit, as to such justices shall seem meet; and also to pay any sum not exceeding 5l. in case such master shall refuse to deliver up such cloaths, and on his refusal to pay the sum so ordered, or any part thereof, such justices may levy the same by distress, together with the reasonable expences of such distress. And such justices may, if they think fit, compel such churchwardens and overseers, or one of them, to enter into recognizance for the effectual prosecution, by indictment of such master, for such ill treatment of any such apprentice so discharged as aforesaid; and may also order that the expences of such prosecution shall be paid or reimbursed to such person entering into such recognizance as aforesaid, one moiety thereof out of the poor rates of the parish or place to which such apprentice shall belong, and the other moiety out of the county rate in which such place shall lie. And in case the churchwardens and overseers shall refuse to pay such their moiety as aforesaid, such justices may levy the same by distress on the goods and chattels of such churchwardens and overseers, or any of them, together with the reasonable charges of such distress. s. 11.

And by 33 G. 3. c. 55. Two justices at any special or petty sessions, upon complaint upon oath by or on the behalf of any parish apprentice or other apprentice upon whose binding out not more than 10l. was paid, of any ill usage by his master, (such master having been duly

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summoned to appear and answer such charge) may impose, upon conviction, any reasonable fine not exceeding 40s. upon such master, as a punishment for such ill usage; and if not paid, may by their warrant levy the same by distress and sale of the goods of such offender, rendering to him the overplus (if any) after deducting such fine and the charges of such distress and sale; to be applied at the discretion of such justices, either to the use of the poor, or for the use and benefit of such apprentice, towards recompence for the injury he may have sustained by reason of such ill usage; and for want of such distress, such offender may be committed to the house of correction for any time not exceeding ten days. *f. 1.*

Persons aggrieved may appeal to the next sessions, upon giving ten days notice thereof. *Id.*

And no person acting under any such warrant, shall be deemed a trespasser *ab initio* by reason of any irregularity in such warrant or proceedings thereupon. *f. 2.*

And two justices on complaint (K) on oath by any master or mistress, against any such apprentice, concerning any misdemeanor, miscarriage, or ill behaviour, may hear and determine (L) the same, and punish the offender, by commitment (M) to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by discharging (N) such apprentice. 20 G. 2. c. 19. *f. 4.*

And in all cases where any parish apprentice shall be discharged for misbehaviour as aforesaid, such two justices may commit such offender to the house of correction, to be corrected and kept to hard labour, for any time not exceeding 3 calendar months. 32 G. 3. c. 57. *f. 13.*

Appeal.

Persons aggrieved by any determination, order or warrant of such justices (except any order of commitment) may appeal to the next sessions, who may award costs to either party not exceeding 40s. to be levied by distress and sale. 20 G. 2. c. 19. *f. 5.*

And no certiorari shall issue to remove any the said proceedings. *f. 6.*

And by 32 G. 3. c. 57. Persons aggrieved by any thing done or omitted by any churchwardens or overseers, or justices, or any other person by virtue of this act, (besides such matters or things for which an appeal is hereinbefore specially given,) may appeal to the next sessions, where the same shall be heard and finally determined; and such court may award reasonable costs to either party. *f. 14.*

If

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If any apprentice in husbandry, or in any art or occupation aforesaid, shall flee into any other shire, the justices, mayors, or other head officers being justices, may issue writs of *capias* to the sheriffs of the counties or other head officers of the places whither he shall so flee, to take his body, returnable before them at what time shall please them; so that if he come by such process he may be put in prison, till he find sufficient surety well and honestly to serve his master. 5 *El. c. 4. f. 47.*

Apprentice fleeing into another shire.

And by the 24 *G. 2. c. 55.* If a justice shall issue a warrant against such person, and he shall escape into another shire; the constable or other person, on having the warrant indorsed by a justice in such other shire, may arrest him there, and carry him before a justice in such other shire, if the offence is bailable, to find bail, or else shall carry him back before a justice in the shire from whence the warrant did first issue.

Feb. 3, 1747. *Hill and Allen.* In chancery. The bill was by an apprentice, who against his master's consent quitted his service of a shipwright, before his time was out, and went on board a privateer, which took a very considerable prize, whose share thereof, being 1200*l.* the master claimed. By *L. Hardwicke:* In general, the master is intitled to all that the apprentice shall earn; consequently, if he runs away, and goes to a different business, the master is intitled at law to all his earnings. And in this case, his lordship said, there was nothing in equity to relieve. But he said he would send the case to be tried at law, unless they would agree to compound the matter, which he recommended to them, and thought, as the boy's share of the prize was so very large, the balance ought to be in his favour. And the master agreed to accept 450*l.* *Veney, 83.*

Apprentice leaving his master's service, the master is entitled to his earnings.

By the 6 *G. 3. c. 25.* If any apprentice shall absent himself from his master's service, before the term of his apprenticeship shall be expired; he shall, at any time thereafter, whenever he shall be found (so it be within 7 years after the expiration of his term), be compelled to serve his said master, for so long time as he shall have absented himself; unless he shall make satisfaction to his master for the loss he shall have sustained by such absence: And if he shall refuse so to serve, or to make satisfaction, the master may complain upon oath to one justice where he shall reside; who shall issue his warrant for apprehending such apprentice. And such justice, on hearing the complaint, may determine what satisfaction shall be made to such master

Apprentice to serve beyond his term, for the time that he absented.

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by the apprentice. And if the said apprentice shall not give security to make satisfaction according to such determination; such justice may commit him to the house of correction for any time not exceeding three months.

Persons aggrieved by such determination, order, or warrant of the justice (except any order of commitment,) may appeal to the next sessions, giving six days notice to the justice and to the parties, and entering into recognizance, within three days after such notice, before a justice, with sufficient surety to try the appeal at and to abide the order or judgment of, and pay such costs as shall be awarded by the justices at such sessions: Which said justices, at their said sessions, on proof of such notice given, and of entering into such recognizance, shall hear and determine the appeal, and give such relief and costs to either party, as they shall judge reasonable. And their determination shall be final and conclusive to all parties concerned.

Provided, that nothing herein shall extend to the stanneries in *Devon* or *Cornwall*; or to impeach or lessen the jurisdiction of the chamberlain of *London*, or of any other court within the said city, touching apprentices; nor to any apprentice, whose master shall have received with him the sum of 10*l*.

VIII. *Apprentice stealing his master's goods.*

By 21 *H. 8. c. 7.* Servants going away with their master's goods, with intent to steal them, shall be guilty of felony; but not to extend to apprentices.

And *Hale* says, that if a man had delivered goods to his servant to keep or carry for him, and he carrieth them away *animo furandi*, this was not felony; but by the above statute it is made felony, if of the value of 40*s.* but the offender shall have his clergy. But yet if an apprentice doth this, or if a man deliver a bond to his servant to receive money, or deliver him goods to sell, and he accordingly sells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by statute. *H. H. 505.*

And by 12 *Ann. st. 1. c. 7.* Persons stealing to the value of 40*s.* being in a dwelling house or out-house thereto belonging, tho' such house be not broken, and tho' no person be therein, are excluded from the benefit of clergy. But this not to extend to apprentices under fifteen years of age.

But

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But if they be fifteen years of age, they shall be excluded from clergy as other persons.

IX. *Inticing away an apprentice.*

The inticing of an apprentice to depart from his master, is not an offence of a public nature, for which an indictment will lie; but the party's remedy is by an action on the case which he may well maintain. *6 Mod.* 182. *Bar. Manuf.* 1306. *Reavely v. Mainwaring* and others.

X. *Assigning apprentices (O).*

The master assigning, and the apprentice himself consenting, will not make him an apprentice to the assignee within the fifth of *El.* But by the custom of *London*, he may be turned over to another. *Dalt. c.* 58.

And an assignment to the sea service is good by act of parliament, as is before mentioned.

E. 3 G. K. and Barnes. Order returned on a certiorari: It is resolved by the justices at the sessions, where a person was bound an apprentice to *Barnes* by the parish officers, and *Barnes* had assigned him to another, that the assignment is void, and they direct *Barnes* to take his apprentice again. But by the court; The sessions had no power to judge of the validity of a deed, or to hinder a man from assigning his apprentice. The covenant to provide for him is well performed, if the person to whom he is bound assigns him to another to provide for him. Wherefore the order was quashed. *Foley*, 155. *Str.* 48.

For the jurisdiction of the justices extends no farther, than to compel the master to take care of his apprentice; but in what manner he does it, whether in his own house or otherwise, is nothing to them. But if the assignee of the apprentice doth not provide for him, the first master may be compelled to do it, and he may take his remedy over. *1 Sess. C.* 110.

XI. *Master dying.*

It hath been said, that if the master dies, the apprentice goes to the executors or administrator to be maintained, if there are assets; but the executor or administrator may bind him to another master for the remaining part of his time.

But in the case of *K. and Pack*, *M. 10 W. Eyre J.* held, that an apprenticeship is a personal trust between the master and

and servant, and determines by the death of either of them; and by the death of either of them, the end and design of the apprenticeship cannot be obtained, and it may be the executor is of another trade; he admitted covenant would lie against the executor, but in that there is no inconvenience, because the executor may make his defence by pleading no assets, or debts of a higher nature. *Holt C. J.* said, that by the custom of *London*, the executor shall put the apprentice to another master of the same trade; and that in other places, it would be very hard to construe the death of the master to be a discharge of the covenants; he said, it had been held, that the covenant for instruction failed, but that he still continues an apprentice with the executor as to maintenance. 1 *Salk.* 66.

E. 20 G. 2. Baxter (widow and executrix) against *Burfield*. In debt on bond, conditioned for *Matthias Anderson's* performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner; the defendant pleaded, that *Anderson* served faithfully to the death of the testator: the plaintiff replied, that since the death of the testator, *Anderson* had absented from her service: to which, there was a demurrer. And after argument at bar, *Lee Ch. J.* delivered the resolution of the court, viz. That they were all of opinion the defendant should have judgment, and that the executrix could maintain no such action. The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the apprentice is bound from a personal knowledge of the integrity and ability of the master. *H. 8 Ann. Horns and Blake*; an award that an apprentice should be assigned, was held void; unless there was a custom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz. 553.* the assets were liable on the master's covenant to maintain. Therefore judgment was given for the defendant. *Str.* 1266.

Note, the words in *Cro. Eliz. 553.* are these: A covenant lies against an executor in every case, altho' he be not named; unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform.

In the court of chancery: *M. 30 G. 2.* In the case of *Stam* against *Bowden and Eyles*. The master received with the apprentice 250*l.* and died within two years, the apprentice

prentice having for that time been employed only in inferior affairs. It was decreed, after debts on specialties paid, that the executors repay the 250l. as a debt due on simple contract: deducting after the rate of 20l. a year, for the maintenance of the apprentice, during the time he lived with his master. *Cha. Co. Finch.* 396.

And by 32 G. 3. c. 57. after reciting, that in the event of the death of the master of any parish apprentice during the apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force as far as his assets will extend; or doubts have arisen with respect thereto: It is enacted, that after the 1st July 1792, in case of the death of the master of any parish apprentice during the apprenticeship, upon which binding no larger sum than 5l. shall be paid, any covenant for the maintenance of such apprentice inserted in the indenture, shall not be in force longer than three calendar months next after the death of such master; and that during such three months, such apprentice shall continue to live with and serve as an apprentice, the executors and administrators of such master, or such person as they, or some or one of them shall appoint: and such master and apprentice, during such three months, shall be subject to all the laws in force for regulating masters and parish apprentices. *f. 4.*

Regulations by
32 G. 3. c. 57.

And whereas it is reasonable that such apprentice as aforesaid, in case of his master's death, should be obliged to make some satisfaction by his labour to the family or representatives of his deceased master, for the advantages he has received in his childhood, when his service could not be equal to his maintenance; It is enacted, that within such three calendar months after the death of such master, two justices, on the application of the widow of such master, or by the husband of the mistress, or by any son or daughter, brother or sister, or executor or administrator of such person deceased, by indorsement (P) on such indenture or counterpart thereof, or by any other instrument or writing (Q), may order and direct that such apprentice shall serve as an apprentice any one of such persons so making application as aforesaid (such person having lived with, or been part of such master's family at the time of his death) as they shall think fit, during the residue of the term mentioned in such indenture: and the person obtaining such order shall declare his acceptance of such apprentice, by subscribing his name to such order: and after such order shall be made, the executors and administrators, and the personal assets, estate, and effects of the master so dying, shall be discharged

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discharged from any covenant in such indenture; and the person obtaining the same shall be deemed the master of such apprentice in like manner as if he had been originally bound to such master; and such last mentioned master, his executors and administrators, shall be bound by the covenants contained in such indenture in like manner as if he had executed the counterpart thereof: and such master and apprentice shall be subject to the several penalties, provisions, and regulations which shall then be in force for governing apprentices: and all justices shall have the like power and authority with respect thereto, as they shall then have by any act of parliament relating to parish apprentices. *f. 2, 3.*

But in case no such application shall be made as aforesaid, within three calendar months as aforesaid; or in case such two justices shall not think fit that such apprenticeship should be continued, then such apprenticeship shall be determined; and the indenture, and covenants therein contained, shall be at an end, in like manner as they would have been at the expiration of the term. *f. 4.*

Provided that nothing herein shall extend to any parish apprentice, but such only as shall be living with, and shall make part of the family, or be in the actual employment of such original master, or some subsequent master appointed by virtue of this act, at the time of his death. *f. 5.*

And whereas delays must happen in bringing an action upon such covenant for maintenance as aforesaid; It is enacted, that in case any such original master, or master appointed by virtue of this act as aforesaid, shall, during the term of any such parish apprenticeship as aforesaid, or the executors or administrators of such master, or any of them, having assets, shall during three calendar months as aforesaid, refuse or neglect to maintain and provide for any such apprentice according to the terms of such covenant; two justices, on complaint of such apprentice, or of the churchwardens and overseers of such place, may levy by distress of the personal estate or assets and effects of such master, such sum as shall be necessary for the maintenance and cloathing of such apprentice; and as shall also be necessary to reimburse to the churchwardens and overseers any sum that shall have been reasonably expended by them for that purpose. *f. 6.*

XII. Apprentices setting up their trades.

By the common law, no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. *11 Co. 53.*

So that without an act of parliament no man may be restrained, either to work in any lawful trade, or to use divers mysteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly and not favourably as acts made in affirmance of the common law.

The restraining clause in the statute of 5 *El. c. 4.* is as follows: *It shall not be lawful to any person, to set up, occupy, use or exercise, any craft, mystery or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at the least as an apprentice by this statute, nor to set any person on work therein, except he shall have been apprentice as aforesaid, or else having served as an apprentice will become a journeyman, or hired by the year; on pain of 40s. a month, half to the king, and half to him that shall sue in the sessions, or other court of record; or if it is in a town corporate, then to be disposed of as other fines by the charter. f. 31.*

It shall not be lawful] This is a negative clause, and no one shall exercise a trade against it, unless by virtue of a custom, as the widows of tradesmen, who by custom carry on the trade of their husbands, which the court held not to be within this statute. 2 *Salk.* 610.

To any person] But by the 15 *C. 2. c. 15.* Hemp workers of all kinds, net makers, and makers of tapestry hangings are excepted; who may set up without having served seven years.

And by 3 *G. 3. c. 8.* All officers, mariners, and soldiers, who have been employed in his majesty's service, and not deserted, may exercise such trades as they are apt for, in any town or place.

And by 6 & 7 *W. c. 19.* An apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade as if he had served out his time. *f. 12.*

To set up, occupy, use, or exercise] *T. 9 G. 3. Brach and Turner.* On an action brought for exercising a trade, without having served an apprenticeship, it appeared that the defendant was only a journeyman. And the question was, whether the statute extends to journeymen, or only to masters? By the court: The statute was meant to prevent masters only from setting up trades, and did not intend to give a penalty against both. There is great difference between setting up a trade and working in it.

A man

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A man may work in it, by doing a very trifling part. A journeyman doth not exercise the trade upon his own account, but for his master. *Burr. Mansf.* 2449.

And it is not material, as to the master, that the journeyman hath served seven years; for if the master himself hath not served seven years, he is restrained by the statute to work as a trader, either by himself or others; for the intent of the act is, to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage labour in youth: And few would undergo the trouble of being apprentices, if they might employ others to work for them. *T. 3 W. Hobbs and Young, 2 Salt.* 610.

If a man use the trade of a tallow chandler, baker, brewer, or any other lawful trade, or manual occupation, for his own use, or for the use of his family, without selling any for lucre and gain, he may lawfully do it; but he cannot retain an apprentice therein; but he may hire one to be his servant, who is skilful in that trade or occupation. *8 Co.* 129.

In like manner, a person brought up to the trade may take a partner, who hath not served an apprenticeship to the trade, provided the partner share only in the profits or loss of the business, and do not actually exercise the trade. As in the case of *Reynard and Chase, M. 30 G. 2.* An action of debt was brought against *Chase*, for a penalty on the act, for exercising the trade of a brewer, without having served an apprenticeship. On a special verdict, it was stated, that the defendant *Chase* and one *Coxe* were partners in the trade; that the trade was carried on, and had been for four years carried on, in their joint names; that *Coxe* did serve an apprenticeship to the trade, but *Chase* never did; and that *Coxe* is a working brewer, and was paid a salary for his labour, which salary was always deducted, and allowed to him previous to a division of the profits; and the entries at the excise office were in their joint names: but that the defendant *John Chase* never exercised the trade himself (which was wholly managed and carried on by *Coxe*); but only shared the profits, and stood the risks of the partnership. The question was, whether the defendant *John Chase* is within the act, upon this special finding?—By *L. Mansfield Ch. J.* The defendant is to share the profits with *Coxe*, in moieties; and is liable to the debts of the partnership: But it is expressly found, that during all the time charged, he never acted in or exercised the trade. He was not, by the terms of his agreement,

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ment, to act in the trade. The other partner was to do the whole, and had a particular salary on that account. It is not found, that either *Coxe*, or any servant under him, was set to work by *Chase*; nor that *Chase* did any act whatever of exercising the trade; he was only concerned in the profits. Now though this may be, to some purposes, exercising a trade in respect of third persons who deal with the partnership as creditors, and within the meaning of the statutes concerning bankrupts; yet the present question is, whether it be exercising a trade contrary to this act. In the argument of this cause it hath been well observed, that this is a penal law; that it is in restraint of natural right; that it is contrary to the general right, given by the common law of this kingdom. To which I will add, that the policy on which the act was made, is, from experience, become doubtful. Bad and unskilful workmen are rarely prosecuted. This act was made early in the reign of queen *Elizabeth*. Afterwards, when the great number of manufacturers, who took refuge in *England* from the duke of *Alva's* persecution, had brought trade and commerce with them, and enlarged our notions; the restraint introduced by this law was thought unfavourable, and the judges by a liberal interpretation, have extended the qualifications for exercising the trade much beyond the letter of it, and confined the penalty and prohibition to cases precisely within the express letter. Let us consider whether the present case be within the letter, or even the meaning of this act. The general policy of the act was to have trades carried on, by persons who had skill in them. Now here, the personal skill of the defendant makes no real difference in the case. For the person who is skilful acts every thing, and receives no direction from this man: He neither did, nor was to interfere. The case of *Hobbs* and *Young* is not parallel. There, the defendant, a single man, directed the whole trade; was the master; and directed all the servants. As between master and servant, no doubt, it is the master who carries on the trade, and not the servant. But in *Hobbs* and *Young* there was no partnership; nor (what is the distinguishing character in the present case) a mere naked sharing of the profits, and risking a proportion of the loss; without his acting or directing at all, in any manner whatsoever. In many considerable undertakings, it is absolutely necessary to take in persons as partners to share the profits and risque the loss. And the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce,

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commerce, and the manner of carrying them on. It is notorious that many partnerships are entered into, upon the foundation of one partner contributing industry and skill; and the other, money. Many great breweries and other trades have been carried on, for the benefit of infants and residuary legatees, under the direction of the court of chancery: Now if the plaintiff's construction was to hold, the whole direction and decree of the court of chancery was contrary to law, and to an express act of parliament. So it is likewise practised in other great trades. The late Mr. *Child* directed his business of a banker to be carried on for the benefit of his children and other persons. Many other instances might be mentioned. It would introduce the utmost confusion in affairs of trade and commerce, if this construction should prevail. On the other hand, I see no inconvenience. It is exactly the same thing as to trade, in every particular, whether this partner has or has not served an apprenticeship. Therefore I think the defendant not liable to the penalty of the statute. The other three justices concurred. And judgment was given for the defendant. *Burr. Manif. 2.*

Any craft, mystery or occupation] T. 3 G. 3. *Franch and Adams*. An action of debt was brought upon the statute against the defendant for exercising the trade of a *carpenter*, he not having served an apprenticeship to that trade. It appeared, that the defendant had worked or served as a servant for seven years in the trade of a *glazier*, and for some time afterwards exercised that trade as a master; that afterwards he exercised the trade of a *carpenter* for the space of nine years, and it was proved that he well understood that trade. It was objected, that the defendant being originally bred up to the trade of a *glazier*, he could not follow two trades both *glazier* and *carpenter*; and whether he could or not, was the question reserved for the consideration of the court.—By the court: All the judges of *England* at a meeting lately resolved, that if any man as a master had exercised and followed any trade as a master without interruption or impediment for the term of seven years, he was not liable to be sued or prosecuted on the statute of 5 *El.*; also if a man hath followed two or more different trades for the term of seven years or more, he shall not be liable to be prosecuted on this statute. There is no law against one man's following several trades at this day: There was an ancient statute, 37 *Ed. 3. c. 6.* that artificers or handicraftsmen should use but one mystery, and that none should use any mystery but that which he had before that time

time chosen and used. But this restraint of trade and traffick was immediately found prejudicial to the public, and therefore at the next parliament it was enacted that all people should be as free as they were at any time before the said ordinance. And *L. Coke* observes, that acts of parliament made against the freedom of trade never live long. Without the least doubt a man may follow twenty trades, if he has worked at or followed each trade seven years. *Mr. Harrison of Red Lion Square* served an apprenticeship to the trade of a carpenter, but for 26 years past he has been a watchmaker, and tho' he never served as an apprentice to the trade of a watchmaker, is the best maker of time pieces in the world, and the parliament has given him a large sum of money towards finding out the longitude by the help of his watches or time measures: And shall this man be hindered from making watches, and exercising the trade of a carpenter also if he pleases? And by the whole court in the present case, judgment was given for the defendant. 2 *Wilson* 168.

Now used] That is, on the 12th of Jan. 1562, when that parliament began; and this restraint shall not extend any further than the words do expressly direct, and therefore not to new arts and mysteries since invented. 1 *Rolls Rep.* 10. 1 *Ventr.* 326, 346.

Within the realm of England and Wales] *M.* 1 *G.* 2. *K. and Lister.* Indictment for using the trade of a dry salter, being a craft, mystery, or occupation used in *this kingdom* on the 12th day of Jan. in the 5th year of *Eliz.* Which the court held to be ill; for that the words in *this kingdom* tie down the indictment to the kingdom of Great Britain, as it is at this day; whereas it should have been in *England or in England and Wales.* 2 *Sess. C.* 160. *Str.* 788.

H. 3 *G.* 2. *K. and Mehro.* It was moved to quash an indictment for exercising the trade of a baker, the defendant not having served a legal apprenticeship. The exception was, the trade was not laid to be used *within the realm of England and Wales* at the time of the act. But the court said, the trade of a baker is within the words of the act; and no averment of the trade's being used at the time of the act is necessary, but where the trade only falls within the general conclusion of the clause at last. 1 *Barbardi.* 277.

Except he shall have been brought up therein seven years] *E.* 11 *W.* *K. and Fox.* Indictment for using the trade of a taylor,
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* taylor, not having served seven years, was quashed, because it is said only, not having served as an apprentice within *England* or *Wales*; for it may be he did so beyond sea, and if it were any where it sufficeth. 1 *Salk.* 67.

As an apprentice.] *E. 5 An. Q. and Maddox.* By the court; Upon indictment on this statute, in evidence we allow following the trade for seven years to be sufficient, without any binding, this being an hard law. 2 *Salk.* 613.

T. 3 G. 2. K. and Morris. On an indictment for exercising a trade, without having served a legal apprenticeship; the defendant offered to give evidence of his having exercised this trade for seven years, as being tantamount to his having served an apprenticeship for that time. *Eyre* Ch. J. said, that the cases indeed had gone so far, as to allow a wife's living in the shop with her husband for seven years to be equivalent to an apprenticeship; but he thought the present case not strong enough to come up to the meaning of the statute. Accordingly the evidence was disallowed. 1 *Barnard.* 367.

But in the case of *Wallen and Holten*, at the assizes for *Berkshire*, *T. 33 G. 2.* On an information against the defendant for exercising the trade of a baker contrary to the statute, it appeared in evidence that he had followed it twelve years, but never had been an apprentice, nor served with any person *as such*. On a case reserved, Baron *Adams*, before whom it was tried, consulted the eleven judges; who all joined with him in opinion, that exercising a trade seven years, without any prosecution with effect, was a sufficient qualification. *Black. Rep.* 233.

Nor to set any person, on work therein, except he shall have been apprentice as aforesaid] But by the 17 *G. 3. c. 33.* with respect to the counties of *Middlesex, Essex, Surry, and Kent*, for want of a sufficient number of persons who have served apprenticeships to the trade of a *dyer*, it shall be lawful for any person exercising that trade within any of the said counties, to employ such number of journeymen, servants, and labourers, as he shall have occasion for, without incurring any penalty.

Or else having served as an apprentice, will become a journeyman] *M. 26 G. 2. K. and Moor.* The defendant was indicted for using the trade of a weaver, not having served as an apprentice seven years; the evidence was, he served six as an apprentice, and had since as journeyman in the same trade worked above that time: And by the court, the serving of seven years is sufficient either way; and the defendant was found not guilty. 3 *Keb.* 400.

vided, which said pair of indentures was signed and confirmed by [us] the said two justices: And whereas the said A. M. is duly convicted before us the justices aforesaid, as well upon the oath of the said A. B. or otherwise, for that he the said A. M. hath refused, and doth refuse to receive and provide for the said A. P. as an apprentice, and also to execute another part of the said indentures, being duly tendered to him by the said churchwardens and overseers of the poor, whereby the said A. M. hath forfeited the sum of ten pounds: These are therefore, in his said majesty's name, to require and command you, to make distress of the goods and chattels of him the said A. M. and if within the space of [lix] days next after such distress by you made, the said sum of 10l. together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, pay the said sum of 10l. to the overseers of the poor of the said parish of ——— where the said offence was committed, for the use of the poor of the said parish; returning the overplus upon demand unto him the said A. M. the reasonable charges of taking, keeping, and selling the said distress being thereout first deducted. Herein fail you not. Given under our hands and seals the ——— day of ——— in the year ———.

Note, as an appeal is given to the sessions, against the appointment of an apprentice to be bound to any person as aforesaid; it is proper, either not to make out, or not to execute, the warrant of distress, until after the next sessions.

And it is to be observed, that one precedent alone in this case is here inserted, for brevity sake, as being not in a matter of constant practice; but it is to be understood, for all such like cases, that there must first be a complaint or information in writing, then a summons of the party accused, or warrant as the case may be, and a hearing and determining of the cause, and conviction thereupon if the party shall be found to be guilty. But as the special fact must be the same throughout all the forms of proceedings, it is easy from one to frame all the rest.

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D. Summons of the master for misusing his apprentice; on 5 *El. c. 4.*

Westmorland. { To the constable of —

WHEREAS complaint and information hath been made unto me — one of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of — in the said county, shoemaker, that the said A. M. hath misused and evil intreated him the said A. P. [by cruel punishment, and beating him the said A. P. without just cause, and by not allowing unto him sufficient meat, drink, apparel, or as the case shall be] These are therefore in his majesty's name to command you to summon the said A. M. to appear before me at the house of — in the said county, on — the — day of — at the hour of — in the afternoon of the same day, to answer unto the said complaint; and to be further dealt with according to law. Herein fail you not. Given under my hand and seal the — day of, &c.

Note, a summons, rather than a warrant, in all such like cases, between party and party, is generally most eligible; yet in this case it seemeth, that a warrant is justifiable to apprehend the master, and bring him before the justice, (especially if he shall contemn the summons;) because it is required, that he shall give security to the justice to appear at the sessions, if he shall not conform to the justice's order in the premises.

E. Summons of the apprentice on complaint of the master; on the 5 *El. c. 4.*

Westmorland. { To the constable of —

WHEREAS complaint and information hath been made unto me — one of his majesty's justices of the peace in and for the said county, by A. M. of — in the said county, husbandman, that A. P. now being an apprentice to him the said A. M. is negligent, stubborn, disorderly, [or as the case shall be] and doth not his duty to him the said A. M. his master; These are therefore to command you to summon the said A. P. to appear before me, at — in the said county, on — the — day of — at the hour of — in the afternoon of the —

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the same day, to answer to the said complaint, and to be further dealt with according to law. Herein fail not. Given under my hand and seal the — day of, &c.

F. Order of discharge by four justices at the sessions; on the 5 El. c. 4. s. 35.

Westmorland. *AT a general quarter sessions of the peace holden at — in and for the county aforesaid, the — day of — in the — year of the reign of our lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth; Before — justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and of the quorum, It is ordered as followeth:*

Upon the petition of A. P. apprentice to A. M. of — in the said county, husbandman, to be relieved upon certain neglects of the said master in instructing him in his trade, and in misusing and evil intreating the said apprentice by cruel punishment [or as the case shall be]; and the said master having likewise appeared upon his recognizance taken before J. P. esquire, one of the said justices, to answer to the complaint of the said petition, and having proved nothing whereby to clear himself of the said complaint; but on the contrary, the said A. P. having given full proof of the truth of the said complaint to the satisfaction of the said court: We therefore, whose hands and seals are hereunto set, being four of the said justices, and of the quorum, do hereby order, pronounce, and declare, that the said apprentice shall be, and is hereby discharged and freed from his said apprenticeship: And this to be a final order betwixt the said master and apprentice, any thing contained in their indentures of apprenticeship, or otherwise, to the contrary notwithstanding. Given under our hands and seals the day and year first above written.

G. Complaint of an apprentice to two justices, against his master; on 20 G. 2. c. 19.

Westmorland. *THE information and complaint of A. P. apprentice to A. M. of — in the said county, husbandman, exhibited before us two of his majesty's justices of the peace in and for the said county, the — day of — in the year, &c.*

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Who saith, that he the said A. P. is an apprentice bound by indenture to A. M. of ———— aforesaid, husbandman; and that he the said A. M. hath misused and ill treated him the said apprentice, and particularly [as the case shall be.]

A. P.

Before us,

J. P.

K. P.

H. Summons of the master by two justices, on complaint of the apprentice; on the 20 G. 2. c. 19. s. 3.

Westmorland. { To the constable of ———

WHEREAS information and complaint hath been made unto us ——— two of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of ——— in the said county, husbandman; that he the said A. M. hath misused and ill treated him the said A. P. and particularly [as the case shall be]: These are therefore to require you to summon the said A. M. to appear before us at ——— in the said county, on ——— the ——— day of ——— to answer unto the said information and complaint. And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under our hands and seals the ——— day of ——— in the year ———.

I. Discharge of an apprentice by two justices, on the master misusing him, by the 20 G. 2. c. 19. s. 3.

Westmorland. *WHEREAS* complaint hath been made before us ——— two of his majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of ——— in the said county, taylor, that he the said A. M. hath misused and evil treated him the said apprentice, and particularly [as the case shall be]: And whereas the said A. M. hath appeared before us in pursuance of our summons to that purpose, but hath not cleared himself of and from the said accusation and complaint, but on the contrary the said A. P. hath made full proof of the truth thereof before us upon oath; We therefore by these presents do discharge him

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him the said A. P. of and from his apprenticeship to the said A. M. any thing in the indenture of apprenticeship made be-
twixt them, or otherwise howsoever, to the contrary notwith-
standing. Given under our hands and seals the ——— day
of, &c.

[Or, And whereas it hath been duly proved before us, as
well upon the oath of A. C. constable of ——— aforesaid, as
otherwise, that he the said A. C. did duly summon the said
A. M. to appear before us at a reasonable time in the said sum-
mons mentioned and specified; but notwithstanding the same, he
the said A. M. hath not appeared before us according to such
summons: We therefore having duly examined into the matter of
the said complaints, and the truth thereof having been fully
proved before us upon oath, do discharge, &c.]

K. Complaint to two justices of the master against
his apprentice; on the 20 G. 2. c. 19. s. 4.

Westmorland. *THE* complaint and information of A. M.
of ——— in the said county, husband-
man, taken and made on oath before us ——— two of his ma-
jesty's justices of the peace in and for the said county, the ———
day of ——— Who saith, that A. P. apprentice by indenture to
him the said A. M. hath in the service of his apprenticeship
been guilty of several misdemeanors, miscarriages and ill be-
haviour, towards him the said A. M. and particularly [as the
case shall be].

A. M.

Before us,

J. P.
K. P.

L. Warrant for a disorderly apprentice, by two
justices; on the aforesaid complaint, by the
20 G. 2. c. 19. s. 4.

Westmorland. } To the constable of ———

WHEREAS oath hath been made before us ———
two of his majesty's justices of the peace in and for the
said county, by A. M. of ——— in the said county, husband-
man, that A. P. apprentice to the said A. M. hath com-
mitted divers misdemeanors against the said A. M. his master,
and particularly [as the case shall be]: These are therefore to
require

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require you forthwith to apprehend the said A. P. and bring him before us, to answer unto the said complaint, and to be dealt with according to law: And you are to give notice to the said A. M. that he appear before us at the same time, to make good the said complaint. Given under our hands and seals, &c.

M. Commitment of an apprentice to the house of correction, on complaint of his master, by two justices; on the 20 G. 2. c. 19. s. 4.

Westmorland. { To the constable of — in the said county, and to the keeper of the house of correction at — in the said county.

***W**HEREAS complaint hath been made before us — two of his majesty's justices of the peace in and for the said county, upon the oath of A. M. of — in the said county, husbandman, that A. P. apprentice of the said A. M. hath committed divers misdemeanors against him the said A. M. his master, and particularly [as the case shall be]: And whereas upon examination thereof, and upon hearing the allegations of both parties, having come before us for that purpose, and upon due consideration had thereof, it manifestly appears to us that he the said A. P. is guilty of the premises so charged against him as aforesaid: We do therefore hereby command you the said constable, to take and convey the said A. P. to the said house of correction, and to deliver him to the said keeper thereof, together with this warrant: And we do hereby command you the said keeper of the said house of correction, to receive the said A. P. into your custody in the said house of correction, there to remain and be corrected, and held to hard labour for the space of —. Given under our hands and seals, the — day, &c.*

N. Discharge of an apprentice by two justices, on complaint of the master; by 20 G. 2. c. 19. s. 4.

Westmorland. ***W**HEREAS complaint, &c. (as in the last precedent) — We do therefore by these presents discharge the said A. P. from his apprenticeship to the said A. M. any thing in any indenture or indentures of apprenticeship betwixt them, or otherwise, to the contrary notwithstanding. Given, &c.*

O. Assign

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O. Assignment of an apprentice.

TO all to whom these presents shall come: I. A. M. of ——— send greeting. Whereas my apprentice A. P. hath divers years yet to come and unexpired of his apprenticeship, to wit, ——— whole years from the ——— day of ——— now last past, as by his indenture of apprenticeship to me sealed doth appear: Now know ye, that I the said A. M. for divers good causes and considerations me hereunto moving, have given, granted, assigned, and set over, and by these presents do fully and absolutely give, grant, assign, and set over, unto A. S. of ———, all such right, title, duty, term of years to come, service and demand whatsoever, which I the said A. M. have in or to the said A. P. or which I may or ought to have in him by force and virtue of the said indenture of apprenticeship. And moreover, I the said A. M. do by these presents covenant, promise, and agree to and with the said A. S. his executors and administrators, that notwithstanding any thing by me the said A. M. to be done to the contrary, the said A. P. shall, during the said term of ——— years, well and truly serve the said A. S. as his master, and his commandments lawful and benefit shall do, and from his service shall not absent himself during the said term. Provided, that the said A. S. shall well intreat and use him the said A. P. and him the said A. P. in the craft, mystery, and occupation of a ——— which be the said A. S. now useth, after the best manner that he can or may, shall teach, instruct, and inform, or cause to be taught, instructed, and informed, as much as thereunto belongeth, or in any wise appertaineth, and shall also during the same term find and allow unto the said A. P. sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice. In witness, &c.

P. Form of the order of two justices, directing a parish apprentice to continue with the widow (or as the case may be) of his deceased master.

County of } **W**HEREAS F. M. within named,
Westmorland. } late of the parish of Orton, in the said
county, died on the ——— day of ——— being within three calendar
months now last past, we two of his majesty's justices of the
peace for the county aforesaid, whose names are hereunto sub-
scribed, on the application and at the request of A. M. widow
(or as the case may be) of the said F. M. living with and
being part of the family of the said F. M. at the time of his
death,

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death, do hereby order and direct, that A. P. the apprentice within named, who was in the service and actual employment of the said F. M. at the time of his death, shall serve the said A. M. as such apprentice, for the residue of the term of such apprenticeship within mentioned, according to the provisions of an act passed in the thirty-second year of the reign of king George the third, intitled, An act for the further regulation of parish apprentices. *Witness our hands this* _____ *day of* _____.

I, the abovenamed A. M. do hereby declare, that the above order is made at my request, and that I do accept the said A. P. as my apprentice, according to the terms and covenants contained in the said indenture, and according to the provisions of the said act. *Witness my hand the day and year above written.*

Q. Form of the like order by a separate instrument.

County of } *W* HEREAS it appears unto us two
Westmorland. } of his majesty's justices of the peace for
the said county, that A. P. was bound an apprentice by the
churchwardens and overseers of the poor of the parish of Orton
to F. M. late of the said parish of Orton, and that the said
F. M. died on the _____ day of _____, being within three
calendar months now last past: Now we the said two jus-
tices, on the application, and at the request, &c. [then to
the end as before, mutatis mutandis.]

R. Form of the assignment of such a parish apprentice, with the consent of two justices, by indorsement on the indenture or counterpart.

County of } *B* E it remembered, that the within named
Westmorland. } F. M. by and with the consent and
approbation of J. P. and K. P. two of his majesty's justices
of the peace for the said county, whose names are subscribed to
the consent hereunder written, doth hereby assign A. P. the
apprentice within named, unto N. M. to serve him during the
residue of the term within mentioned; and that be the said
N. M. doth hereby agree to accept and take the said A. P.
as an apprentice for the residue of the said term, and doth
hereby acknowledge himself, his executors and administrators,
to be bound by the agreements and covenants within mentioned
on the part of the said F. M. to be done and performed, ac-
cording

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ording to the true intent and meaning thereof, and pursuant to the provisions of an act passed in the thirty-second year of the reign of George the third, intituled, An act for the further regulation of parish apprentices. In witness whereof we the said F. M. and N. M. have hereunto set our hands, this — day of —.

We, two of his majesty's justices of the peace above mentioned, do consent thereto. Witness our hands, this — day of —

J. P.
K. P.

S. Form of the like assignment by a separate instrument.

County of } *W H E R E A S* it appears unto us J. P.
Westmorland. } and K. P. two of his majesty's justices
of the peace for the said county, whose names are subscribed to the
consent here under written, that A. P. was bound an apprentice
by the churchwardens and overseers of the poor of the parish
of Orton, to F. M. of the same parish of Orton; by indenture bearing date on or about the — day of —
until the said A. P. should attain his age of twenty-one years.
Now be it remembered that the said F. M. by and with the
consent, &c. [And so to the end as before, mutatis mutandis.]

Approver.

AN *approver* (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment 3 *Inst.* 129.

This accusation of himself, and oath, makes his accusation of another person of the same crime, to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129, 130.

Approver.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. *3 Inst.* 130.

And besides, as it is in the discretion of the court, whether they will suffer one to be an approver, this method of late hath been seldom practised: And in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices.

Arbitration. See Award.

Army. See Soldiers and Militia.

Arrack. See Brandy.

Arraignment.

WHEN an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison; the first thing that follows thereupon, is his arraignment. *2 H. H.* 216.

Now arraignment is nothing else but the calling the offender to the bar of the court, to answer the matter charged upon him. *2 H. H.* 216.

And the word in Latin (lord *Hale* saith) is no other than *ad rationem ponere*, and in French *ad resen*, or abbreviated *a resn*; for as the ancient word *disfrain* or *derayn* imports in Latin *disfrationare*, to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *ad rationem ponere*, to call to account or answer. *2 H. H.* 216. And this perhaps may be sufficient to shew the meaning of the word, altho' not to declare its derivation; for it seemeth to have flowed unto the French tongue, from its common origin with the Greek; of which we shall have little doubt, when we consider the verbs *αγορευω*, *καταγορευω* and also *διαγορευω*, as they are used in the classical remains of that language, and compare them with the terms *arraigne*, *adraigne*, *disfrayn*, *derayns*.

The prisoner on his arraignment, tho' under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles and bonds, unless there

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there be a danger of escape, and then he may be brought with irons. 2 *H. H.* 219.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same persons, it is all one. 2 *Harc.* 308.

For other matters relating to this head, See Title Sessions.

Arrest.

THIS title is to be understood of arrests in criminal cases only, and not in civil cases.

The word *arrest* is the same, with very little variation, in the *English*, *French*, *German*, *Belgic*, and other languages of the western empire, heretofore subject to the *Roman* power; and probably may have been derived unto us thro' the channels both of *France* and *Saxony*: the French *arrester* signifieth to stop or stay; and the Saxon *restan* to rest; and both perhaps have sprung from the Italian *arresto*, and that from the well known Latin verb *sto*, to stand.

And, in law, an arrest doth signify the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of imprisonment. *Lamb.* 93.

Concerning which I will shew,

- I. *Who may or may not be arrested.*
- II. *For what causes of suspicion an arrest may be.*
- III. *By whom the arrest shall be made.*
- IV. *The manner of an arrest.*
- V. *What is to be done after the arrest.*

I. *Who*

*I. Who may or may not be arrested.***Privilege of parliament.**

Generally, a member of parliament shall have the privilege of parliament for himself and his servants to be freed from arrests: but for treason, felony, and breach of the peace there can be no privilege. 4 *Inst.* 24, 25.

Peers and bodies corporate.

In cases of peers and corporations, the process is a distringas, for they cannot be arrested. 3 *Salk.* 46.

Persons charged in execution.

In the case of *K. and Woodham*, *H. 2 G. 2.* upon a motion for an information against the defendant who was a justice of the peace; it was held, that a person in execution in the king's bench may be there charged criminally by a justice of the peace's warrant: but that no such justice can take a prisoner of this court out of the custody of the court, and send him to the county gaol. *Str.* 828.

In churchyards.

None shall arrest priests or their clerks, or other persons of holy church, whilst they attend to divine service, in churches, churchyards, or other places dedicated to God; on pain of imprisonment and ransom at the king's will, and he shall also make gree to the parties arrested. 50 *Ed.* 3. c. 5. 1 *R.* 2. c. 15.

On Sundays.

Also a warrant executed against any person whatsoever, on the Lord's day, is void; and the persons serving the same shall suffer damages, as if they had done the same without warrant; except in cases of treason, felony, and breach of the peace. 29 *G.* 2. c. 7. f. 6.

*II. For what causes of suspicion an arrest may be.***Suspicion.**

By the statute of 34 *Ed.* 3. c. 1. Power is given to the justices of the peace, to arrest all those whom they find by indictment, or by suspicion, and to put them in prison.

Causes of suspicion.

The causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow:

Common fame.

(1) The common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

Circumstances of guilt.

(2) The being found in such circumstances, as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The

(3) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. 2 *Haw.* 76. Flight.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. 2 *Haw.* 122.

(4) The being found in company with one known to be an offender; at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52. Evil company

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76. Living idle.

(6) The being pursued by hue and cry. 2 *Haw.* 76. Hue and cry.
For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame; suspicious, unknown; not indicted; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

(7) But generally, no such cause of suspicion, as any of the abovementioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 *Haw.* 76. Where no crime is committed.

(8) In the case of *Samuel* against *Payne* and others, *E.* 20 G. 3. The plaintiff *Samuel* brought an action of trespass and false imprisonment against *Payne* a constable and two others. The facts were these: *Hall*, one of the defendants, charged the plaintiff with having stolen some laces from him; which he said were in the plaintiff's house. A search warrant was granted by a justice upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found; however, *Payne*, *Hall*, and the other defendant an assistant of *Payne*, arrested the plaintiff and carried him before a magistrate; who upon examination discharged him. The cause was tried before *L. Mansfield*, and a verdict found against all the three defendants. At the trial, his lordship, and the counsel on both sides; looked upon the rule of law to be, that if a felony hath actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that if no felony has been committed; the apprehending of a person suspected cannot be justified by any one. His lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however,

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However, was considered as inconvenient and narrow, because if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer doth his duty in carrying the accused before a magistrate, who is authorized to examine, and commit or discharge. On this ground, a motion was made for a new trial; and, after cause shewn, the court held, that the charge was a sufficient justification to the constable and his assistant, and the rule for a new trial was made absolute. Which new trial came on before L. Mansfield, at the sittings after this term; when a verdict was found against *Hull*, and for the other two defendants. *Douglas* 345.

E. 23 G. 3. Ledwith v. Catchpole. This was an action of trespass and false imprisonment tried before L. Mansfield at *Guildhall*. The defendant was one of the marshalsmen of the lord mayor of *London*. The jury found a verdict for the plaintiff with 20*l.* damages. Upon motion for a new trial, L. Mansfield reported the evidence to have been: That one *Smith*, who had lost some linens to a large amount, brought one *Stevens* to the defendant, who said, that one *Madox* had called a coach and put *Smith's* bale of goods into it at a public house, that the plaintiff put his head into the coach; that afterwards the coach stopped at another house, and that the plaintiff met it there: That *Smith* suspecting the plaintiff to have been concerned in the theft, from the circumstance of his having been twice so seen at the coach, took the defendant on a *Sunday* to the plaintiff for the purpose of having him apprehended: That when they came to him, neither *Smith*, or any other person charged the plaintiff with a felony; that *Smith* said, "I have lost some cloth; but I don't say that it was he who stole it; I know nothing of that, but stolen it was." The defendant being asked by the plaintiff what authority he had to arrest him, produced a hanger, and said, "That was his authority;" That he then did arrest the plaintiff, and took him to the *Poultry* Compter; from whence he was taken the next day before the sitting alderman and discharged.—*Buller* J. This is a question of consequence, and will require some consideration. I think, that if we were to say that a constable is justifiable in this case, we should go the length of saying, that he is to some purposes a judicial officer, which

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which is going further than has ever yet been adjudged. It would be to allow a constable to examine witnesses, act upon their testimony, tho' he cannot administer an oath, and judicially to conclude, whether there is or is not a reasonable ground of suspicion, and this might be attended with danger. Where a positive charge is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action. In such case the constable is merely ministerial, and bound to take the party up and carry him before a magistrate. The magistrate must then examine into the matter upon oath, which the constable cannot do.—*Willes J.* A felony is committed. The prisoner looked into the coach where the stolen goods were deposited at the time, and afterwards met the coach where it stopped. Then called upon as the constable was to act, and under such strong circumstances of suspicion, I think it became his duty so to act; and that there ought to be a new trial.—*L. Mansfield.* The question is, whether a felony has been committed or not? And then the fundamental distinction is, that if a felony has actually been committed, a private person may as well as a peace officer arrest; if not, the question always turns upon this, Was the arrest *bona fide*; was the act done fairly and in pursuit of an offender, or by design or malice and ill will? Upon a highway robbery being committed, an alarm spread and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if under probable cause an arrest could not be made; and felons usually are taken up on descriptions in advertisements. Many an innocent man has and may be taken up upon suspicion: but the mischief and inconvenience to the public in this point of view is comparatively nothing. It is of great consequence to the police of the country. I think there should be a new trial. *Per L. Mansfield and Willes J.* Rule absolute. *Cald. Cas.* 291.

The new trial came on at the sittings after this term, when a verdict was found for the defendant.

III. By whom the arrest shall be made.

In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

Arrest without
warrant.

By a justice of the peace.

If a justice see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the offender. And he may also, by word of mouth, command any one to arrest another who shall be guilty of any felony, or actual breach of the peace, in his presence, and such command is a good warrant without writing. 2 *Hale's Hist.* 86.

By private person.

And all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. 2 *Haw.* 74.

Also, every private person is bound to assist an officer demanding his help, for the taking of a felon, or the suppressing of an affray. 2 *Haw.* 75.

Also by the vagrant act of 17 G. 2. Every private person may apprehend beggars and vagrants.

By watchmen.

Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 *Inst.* 52.

By constables.

In like manner, a constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1. *H. H.* 587.

By others.

Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

Arrest with warrant :

So much concerning an arrest without a warrant; next follows arresting with such warrant :

By the sheriff or constable.

The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1. *H. H.* 581.

Sheriff may depute.

If it be directed to the sheriff, he may command his bailiff, under-sheriff, or other sworn and known officer, to serve it, without writing any precept. But if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise false imprisonment will lie. *Lamb.* 89.

Others cannot depute.

But every other person to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 86.

Where a constable may execute it out of his own district.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their

their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable *by name*), he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. Lord *Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good: but he is not compellable to execute it, unless he be a proper officer. 1 *H. H.* 581. Any person may execute.

But by the justices oath of office, the warrant ought not to be directed to the party, but to some indifferent person, to execute it. But not to be directed to the party.

If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169. Where directed to two jointly.

IV. The manner of an arrest.

The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169. To be gone about immediately.

It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony: and it seems, that a person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. 2 *Haw.* 121. Opposing the execution.

An arrest in the night is good, both at the suit of the king and of the subject; else the party may escape. 9 *Co.* 66. Arresting in the night.

By the 24 *G. 2. c.* 55. Constables and others may, on having the warrant indorsed by a justice in another county, into which an offender shall have escaped, arrest an offender in such other county, and carry him before the justice who indorsed the warrant, or some other justice of such other county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue. Arresting in another county.

A private person cannot raise power to arrest or detain a felon. 1 *H. H.* 601. Taking the power of the county.

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons;

lons; or such as do break, or go about to break, or disturb the king's peace: and every man being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c. 171.*

But it is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Id.*

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel. *Id.* Because, by the statute of *Winchester*, all of that age are bound to have harness.

But women, ecclesiastical persons, and such as be decrepit, or diseased, shall not be compelled to attend them. *Id.*

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. *Id.*

Breaking open
doors.

As to the case of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities, but in cases of necessity; and therefore, that no one can justify the breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Haw. 86.*

But where a person authorised to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

(1) Upon a *capias* grounded on an indictment for any crime whatsoever; or upon a *capias* from the chancery or king's bench, to compel a man to find sureties for the peace or good behaviour. 2 *Haw. 86.*

(2) When one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him:

And

And this opinion he founds on *Coke's 4 Inst.* 177. and *Hale's pleas of the crown.* 91. 2 *Haw.* 87.

But Lord *Hale*, in his history of the pleas of the crown, says, that upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed, may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of lord *Coke*: for in such case the process is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do upon a civil process: But then he must at his peril see that the felon be there: for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *H. H.* 117.

But it seems that he that arrests as a *private man* barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is, if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 *H. H.* 82.

But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it; and therefore they cannot break open doors; but in case of a constable he is punishable if he omit it upon complaint. 2 *H. H.* 92.

(3) Upon a warrant from a justice of the peace, to find sureties for the peace or good behaviour. 2 *Haw.* 86. 1 *H. H.* 582. 2 *H. H.* 117.

And in general, Mr. *Dalton* says, an officer upon any warrant from a justice either for the peace or good behaviour, or in any case where the king is party, may by force break open a man's house, to arrest the offender. *Dalt.* 2. 169.

(4) On a warrant to search for stolen goods, the doors may be broke open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion, is punishable. 2 *H. H.* 151.

(5) Where forcible entry or detainer is found by inquisition before justices of the peace, or appears on their view. 2 *Haw.* 86.

(6) On a *capias utlagatum*, or *capias pro fine* 2 Haw. 86.

(7) On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfeiture to the king. 2 Haw. 86.

(8) Where an affray is made in a house, in the view or hearing of the constable, he may break open the doors to take them. 1 Haw. 137. 2 Haw. 87.

(9) If there be disorderly drinking or noise in a house, at an unreasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance, and being refused, may break open the doors, to see and suppress the disorder. 2 H. H. 95.

(10) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house. 2 Haw. 87.

(11) But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door. 1 H. H. 584.

(12) Neither ought doors to be broke open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. 2 Haw. 87. 12 Co. 131.

(13) In a civil suit; the officer cannot justify the breaking open an outward door or window in order to execute process. If he doth, he is a trespasser. But if he findeth the outward door open, and entreth that way, or if the door be opened to him from within, and he entreth, he may break open inward doors if he findeth that necessary in order to execute his process. *Fost.* 319.

For a man's house is his castle, for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit taketh refuge in the house of another, this rule doth not extend to him, it is not *his* castle, he cannot claim the benefit of sanctuary therein. *Fost.* 320.

And it is always to be remembered, that this rule must be confined to the case of arrest upon process in civil suits only. For where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace; the party's own house is no sanctuary for him: in these cases, the justice which is due to the publick must supersede every pretence of private inconvenience. *Id.*

(14) Finally, in all these cases, if an officer, to serve any warrant, enters into a house, the doors being open, and

and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw* 87.

If there be a warrant against a person, for a trespass or breach of the peace, and he flies and will not yield to the arrest, or being taken makes his escape; if the officer kills him it is murder. 2 *H. H.* 117.

Killing in the arrest or pursuits

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard kills him, this is no felony; for he is not bound to go back to the wall as in common cases of *se defendendo*, for the law is his protection. 2 *H. H.* 118.

But where a warrant issueth against a person for felony, and either before arrest, or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him it is no felony. And the same law is, for a constable that doth it by virtue of his office, or on hue and cry. *Id.*

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *H. H.* 119.

But tho' a private person may arrest a felon; and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity; yet it is at his peril that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. *Id.*

A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. 2. *Haw* 85.

Whether the constable need to shew his warrant.

And an officer giveth sufficient notice what he is, when he saith to the party, I arrest you in the king's name; and in such case, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt. c.* 169.

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But the learned editor of *Hale's history* observes here-upon, that the books referred to intend the general warrant constituting such person an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwise in case of felony, because in such case a private person may arrest a felon without any warrant at all. 2 *H. H.* 116.

But if he acts out of his precinct, or is not sworn and commonly known, he must shew his warrant if demanded. 2 *Haw.* 85, 86. Otherwise the party may make resistance, and needs not to obey it. *Dalt. c.* 169.

But if the constable has no warrant, but doth it by virtue of his office, as a constable, it is sufficient to notify that he is constable, or that he arrests in the king's name. 1 *H. H.* 583.

But in the case of a warrant of distress, issued by a justice of the peace, for the levying a pecuniary forfeiture or sum of money, it is specially provided by the statute of the 27 *G. 2. c.* 20. that the officer executing the same, shall, if required, shew his warrant to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

No arrest by
words only.

If the constable come unto the party, and require him to go before the justice, this is no arrest nor imprisonment. *Dalt. c.* 170.

For bare words will not make an arrest without laying hold on the person or otherwise confining him. But if an officer comes into a room, and tells the party he arrests him, and locks the door, this is an arrest; for he is in custody of the officer. 1 *Salk.* 79. 2 *Haw.* 129. *Cases in the time of L. Hardwicke.* 301.

Retaking after
arrest.

It hath been holden, that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large, upon his promise to come again and find sureties, he cannot afterwards arrest him by force of the same warrant: However if the party return, and put himself again under the custody of the constable, it seems that it may be probably argued, that the constable may lawfully detain him, and bring him before the justice, in pursuance of such warrant; but in this the law doth not seem to be clearly settled. 2 *Haw.* 81.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county. *Dalt. c.* 169.

V. What

V. What is to be done after the arrest.

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do any of these three things:

(1) He may carry him to the common gaol; but that is now rarely done. 1 H. H. 589. 2 H. H. 77.

(2) He may deliver him to the constable, who may either carry him to goal, or to a justice of the peace. 1 H. H. 589.

(3) He may carry him immediately to a justice of the peace. *Id.*

If the constable, or his watch, hath arrested affrayers, or persons drinking in an alehouse disorderly at an unreasonable time of night, he may put the persons in the stocks, or in a prison if there be one in the vill, till the heat of their passion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a justice. 2 H. H. 95.

If the arrest is by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party, according to the direction of the warrant: If it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county, then it is in the election of the officer, to bring him before what justice he thinks fit, and not in the election of the prisoner. 1 H. H. 582. 2 H. H. 112.

But if the time be unreasonable, as in or near the night whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks, or in an house, till the next day, or such time as it may be reasonable to bring him. 2 H. H. 120.

And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him. *Id.*

But it is said, the constable is not obliged to return the warrant itself, but may keep it for his own justification, in case he should be questioned for what he had done; but only to return what he has done upon it. L. *Raym.* 1196.

And this seems to be implied in the statute of the 24 G. 2. c. 44. which enacteth, that no action shall be brought

By a private person.

By a watchman.

By an officer by warrant.

Returning the warrant.

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brought against any constable or other officer, or person acting by his order, and in his aid, for any thing done in obedience to the warrant of a justice of the peace, until demand hath been made, or left at the usual place of his abode, by the party, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand: And if, after compliance therewith, any such action shall be brought, without making the justice who signed the warrant defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant. *s. 6.* And it is certain the constable cannot grant a perusal or copy of the warrant, unless he hath it in his custody.

Fee for arrest.

By an ancient statute, 23 *H. 6. c. 10.* No sheriff shall take for any arrest, but 20 d. and the bailiff which maketh the arrest 4 d. on pain of 40 l. ; half to the king, and half to him that will sue in sessions (or the courts above), and treble damages to the party injured.

Upon which statute perhaps may be founded the custom in many places, of giving 4 d. to the constable with the warrant, for his trouble in executing the same; which indeed at that time might be a reasonable satisfaction; for 4 d. then was worth more than ten times the value of 4 d. now. Which decrease in the value of money, in this and many other cases depending upon ancient statutes, may seem to require some consideration.

The rewards for arresting or apprehending highwaymen and others, may be found under their respective titles.

Arson. See Burning.

Assault and Battery.

- I. *Assault, what.*
- II. *Battery, what.*
- III. *In what cases they may be justified.*
- IV. *How punished.*

I. *Assault, what.*

ASSAULT, *assultus*, from the French *assayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without

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without a weapon; or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner. 1 *Haw.* 133.

And from hence it clearly follows, that one charged with an assault and battery, may be found guilty of the assault, and yet acquitted of the battery: But every battery includes an assault; therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 *Haw.* 134.

Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault. *Id.*

II. Battery, what.

Battery (from the Saxon *batte*, a club, or *beaten*, to beat, from whence cometh also the word *battle*) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *Haw.* 134.

III. In what cases they may be justified.

A man may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. 3 *Salk.* 46.

Also if an officer having a lawful warrant lay hands on another, to arrest him, or if a parent in a reasonable manner chastise a child, a master his apprentice, a school-master his scholar; in all these cases, and such like, it is justifiable. 1 *Haw.* 130.

Likewise a person may justify an assault and battery of another, who doth menace or assault him, and attempt to beat him from his lawful watercourse or highway. *Pult.* 42.

Likewise, if a person comes into my house, and will not go out, I may justify laying hold of him, and turning him out. 3 *Black.* 120.

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this difference,

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difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. 1 *Haw.* 134.

And if a defendant prove that the plaintiff first lifted up his staff, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. *Buller's Nisi Prius.* 18.

IV. How punished.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Haw.* 134.

But on an action of assault and battery, where the jury shall give less than 40s. damages, the plaintiff shall have no more costs than damages, unless the judge shall certify on the back of the record, that an actual battery (and not an assault only) was proved upon the trial. 43 *El. c. 6.* 22 & 23 *C. 2. c. 9. s. 136.*

And it is an aggravation of the offence on account of the person on whom, or the place where the same is committed: As where a man assaults or threatens another for suing him; a counsel or attorney for being employed against him; a juror for his verdict; or a gaoler or other ministerial officer for keeping him in custody and properly executing his duty. 4 *Black. Com.* 126.

By 6 *G. 2. c. 23. s. 11.* Assaulting in the street or highway, with intent to spoil people's cloaths, and so spoiling them, is felony and transportation.

By 7 *G. 2. c. 21.* Assaulting with intent to rob, is also made felony and transportation.

And by 9 *Ann. c. 16.* Assaulting a privy councillor in the execution of his office, is felony without benefit of clergy.

A private assault is not inquirable in the leet, not being a common nuisance, as all affrays are. 1 *Haw.* 135.

Warrant for an assault.

Westmorland. { To the constable of —

WHEREAS complaint hath been made before me
J. P. esquire, one of his majesty's justices of the peace
in and for the said county, upon the oath of A. I. of — in
the

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the said county, taylor, that A. O. of ——— aforesaid, butcher, did on the ——— day of ——— violently assault and beat him the said A. I. at ——— aforesaid in the county aforesaid: These are therefore, in his said majesty's name, to command you forthwith to apprehend the said A. O. and to bring him before me to answer unto the said complaint, and to be further dealt withal according to law. Given under my hand and seal the ——— day of, &c.

Indictment for an assault.

THE jurors for our lord the king upon their oath present, that A. O. of ——— in the said county, butcher, on the ——— day of ——— in the ——— year of the reign of ——— at ——— aforesaid in the county aforesaid, in and upon A. I. taylor, then and there being in the peace of God and of our said lord the king, with force and arms, an assault did make, and him the said A. I. then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the said A. I. to the evil example of all others offending in the like kind, and against the peace of our said lord the king, his crown and dignity.

Assizes.

ASSIZE (*assesse*) anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possession. Which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

To which commission of *assize*, four other commissions are now superadded; to wit,

Assize, what,

The circuit commissions.

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.

(2) A

Affizes.

(2) A commission of *oyer and terminer*, directed to the judges, and many other gentlemen of the county; by which they are impowered to *bear and determine* treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

(4) A commission of the *peace* in every county of their circuit.

Sheriffs, justices, and others to attend there.

By the precept for the general gaol delivery above-mentioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

By virtue whereof, all justices of the peace, mayors, and others abovementioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Crown. Circ. Comp. 4.*

Constables presentment.

Also, by ancient custom (that is, by the common law of the land) before the coming of the judges, the high constables issue their warrants to the petty constables, to make presentments of all crimes and offences cognizable at the assizes; to the intent (as is seemeth) that the judges thereby may have a general information and knowledge, how the peace hath been kept: which presentments being delivered to the high constables, are by them delivered into court, and make up part of the rolls, and other remembrances abovementioned.

Which said warrants of the high constables perhaps may be best drawn upon the words of the commission of oyer and terminer, which is the largest of all the five commissions abovementioned: And then the form thereof may be thus;

Westmorland, } To the constable of ——— in the said
East Ward. } county.

THESSE are to require you the said constable, in his majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions; counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms and dominions whatsoever; and of all the murders, felonies, manslaughterers, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits, and all other evil doings, offences and injuries whatsoever; and also the accessaries of them; by whomsoever, and in what manner soever, done, committed or perpetrated, within your constablewick. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at ——— in the said county, on ——— the ——— day of ——— at the hour of ——— in the forenoon of the same day, that I may have the said presentment ready to be delivered to his said majesty's justices of oyer and terminer and general gaol delivery at the next assizes to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the ——— day of ——— in the year of our Lord ———

John Bowness, High Constable.

Whereas the courts of assize, nisi prius, oyer and terminer, and gaol delivery, for several counties at large, are often held in or near cities or towns that are counties of themselves, and at the same time with the like courts for the said cities or towns; and inconveniencies frequently arise in transacting the business of the several courts, for that the lodgings of the judges are situate either only in the county at large or only in the county of such city or town; it is therefore enacted, that whenever the said courts for any county at large shall be held in or near any city or town which is also a county of itself, with the like or any of the like courts for the said city or town, the lodgings of the judges shall be construed and taken to be situate both within the county at large, and also within the county of such city or town, for transacting the business of the assizes for such county at large, and for the county of such city or town, during the time that such judge or judges shall continue therein for the execution of their several commissions. 19 G. 3. c. 54. s. 70.

In what cases the judges may act the out of the proper county.

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make fast. The Italian word is *attacare*; the Spanish *attacar*; and the Saxon *tæcan*, to take.

It signifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of *Westminster-hall*, and above all the court of king's bench, may proceed in a summary manner, according to their discretion. 2 *Haw.* 141.

But in the case of *K. and Bartlett*, *H. 8 G. 2.* it is said that generally the sessions have not a power to award an attachment; but the court said, they would not determine how it would have been, if they had committed the person for contempt; but the ordinary and proper method is, by indictment. 2 *Seff. Ca.* 176.

Attainder.

THE difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession, and when he hath his judgment upon the verdict or confession, then he is said to be attainted. 1 *Inst.* 390.

That is to say, his blood is become (*attinctus*) tainted, stained, or corrupted; insomuch that by the common law, in cases of treason or felony, his children or other kindred cannot inherit his estate; nor his wife claim her dower; and the same cannot be restored or saved, but by act of parliament; and therefore in divers instances, there is a special provision by act of parliament that such or such an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs.

Attaint.

ATTAINT is a writ that lieth, where a false verdict in a court of record, upon an issue joined by the parties, is given. 1 *Inst.* 294. Which is treated of under the title *Jurors*.

Attorney.

AN attorney is one who is appointed to do any thing Who.
in the turn, stead or place of another, 1 Inst 51.

No attorney or solicitor shall be capable to continue or be a justice of the peace, during such time as he shall continue in the business and practice of an attorney or solicitor.—But this not to extend to any city or town being a county of itself, nor to any city, town, or liberty, having justices of their own. 5 G. 2. c. 18.

Justice of the peace not to act as attorney.

No under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in the king's courts, during the time that he is in office with any such sheriff. 1 H. 5. c. 4.

Under-sheriff.

No steward, bailiff, nor minister of lords of franchises, which have return of writs, shall be attorney in any plea within the franchise or balliwick, whereof he shall be officer. 4 H. 4. c. 19.

Steward of a franchise.

No recusant convict shall practise as an attorney or solicitor, on pain of 100l. half to the king, and half to him that shall sue. 3 J. c. 5. f. 8.

Recusant.

If any person, who hath been convicted of forgery, perjury, or subornation of perjury, or common barratry, shall practise as an attorney or solicitor; he shall be transported for seven years. 12 G. c. 29. f. 4.

Persons convicted of barratry, or other crime.

No person shall act as attorney or solicitor, unless he shall have been bound for five years. 2 G. 2. c. 23. f. 5, 6.

To be bound for 5 years.

And every person bound to serve as clerk to any attorney or solicitor, shall within three months cause an affidavit to be made of the actual execution of the contract; in which affidavit shall be specified, the name of the attorney and solicitor and of the person so bound, their places of abode, and the day of the date of such contract: such affidavit to be filed within the said time, in the court where the attorney or solicitor is enrolled. 22 G. 2. c. 46. f. 3.

Affidavit to be made thereof.

But there is generally an indemnifying clause in some act every two or three years, for relief of persons who have omitted to cause such affidavits to be made and filed, provided they cause the same to be done within a time therein limited.

And no person so bound shall be admitted or enrolled an attorney or solicitor, before such affidavit so filed shall be produced and openly read in court. 22 G. 2. c. 46. f. 4.

Actual service
for the whole
5 years.

And such clerk shall, during the whole time of service specified in the contract, continue and be actually employed by such attorney or solicitor or his agent, in the proper business of an attorney or solicitor. 22 G. 2. c. 46. s. 8.

Provided, that if the master shall die or discontinue his practice, or if the contract shall by consent be cancelled, or such clerk be discharged by order of court; the clerk may be bound, during the residue of the term, to another master: so as affidavit be made and filed as aforesaid, of the execution of such second or other contract. s. 9.

And such clerk, before he shall be admitted attorney or solicitor, shall cause an affidavit of himself, or of the attorney or solicitor to whom he was bound, to be made and filed as aforesaid, that he hath actually and really served and been employed by such practising attorney or solicitor or his agent, during the said whole terms of five years. s. 10.

Swearing and
admission.

One of the judges in the courts of law, and the master of the rolls, or two masters in chancery, and a judge of the other courts of equity respectively; shall examine any person touching his fitness and capacity to be an attorney or solicitor: and if approved of, he shall be sworn in open court, and admitted and inrolled, without fee, except 1 s. for administering the oath. Which admission (on a quadruple 40s stamp) shall be signed, and delivered to him. 2 G. 2. c. 23. s. 4, 5, 6.

And the attorney's oath shall be this: "*I A. B. do swear, that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me God.*" s. 13.

The solicitor's oath; "*I A. B. do swear, that I will truly and honestly demean myself in the practice of a solicitor, according to the best of my knowledge and ability; so help me God.*" s. 14.

Penalty of
acting before
inrolled.

If any person shall act as attorney or solicitor, for or in expectation of any gain or reward, without being admitted and inrolled as aforesaid; he shall forfeit 50 l. and be incapable to act for the future: The said penalty to be recovered in any of the courts of record at *Westminster*, or in the counties palatine respectively, or great sessions in Wales, or at the assizes or sessions, by any person who shall sue for the same within 12 months, together with treble costs; and no proceedings thereupon shall be removed.

moved before judgment, or stayed by any certiorari or other writ. 2 G. 2. c. 23. s. 24, 25.

And by the 7 & 8 W. c. 24. Any attorney or solicitor, acting as such, before he hath taken the oaths and subscribed the declaration, as other persons qualified for offices, shall incur a præmunire.

And every attorney or solicitor practising in any court holding pleas for 40 s. or upwards, shall take out a certificate of his admission, inrolment, or register, for which he shall pay a stamp duty, if within the bills of mortality of 5 l. elsewhere 3 l. the same to be renewed annually ten days at least before the end of the year, on pain of forfeiting 50 l. to be recovered in the courts at *Westminster*. 25 G. 3. c. 8c. s. 1, 7.

The said duties to be under the management of the commissioners of the stamp duties. s. 2.

By 34 G. 3. c. 14. Every person who shall become bound to serve as a clerk in order to his admission as a solicitor or attorney in any of the courts at *Westminster*, shall be charged an additional stamp duty of 100 l. And in any of the courts of great session in *Wales*, or in the counties palatine of *Cheshire*, *Lancaster*, or *Durham*, or in any court of record in *England* holding pleas, where the debt or damage shall amount to 40 s. and not in any of the said courts at *Westminster*, a stamp duty of 50 l. s. 1. And by the several stamp acts, the binding shall be upon a 7 s. stamp.

And no person who shall be bound to serve as a clerk as aforesaid, shall be admitted to be a solicitor or attorney in any of the said courts, unless the indenture or other writing containing such contract duly stamped according to the directions of this act, shall be inrolled or registered with the proper officer to be appointed for that purpose in the court wherein such person shall propose to be afterwards admitted a solicitor or attorney by virtue of his service under such contract, together with an affidavit of the time of the execution of such contract by such clerk; and if not so inrolled or registered within six months next after the execution thereof, together with such affidavit of the time of the execution of such contract, then the service of such clerk under such indenture or writing, shall be deemed to commence from the time of such inrollment or registry only; and not from the execution thereof. s. 2.

And every such clerk, previous to his being permitted to practise, shall make an affidavit of the due payment of the said duty, and shall insert therein the sum paid in respect thereof, and also shall specify the name and place of

abode of the person with whom such contract was made, and the time of the execution thereof, and of inrolling or registering the same; and if he have been previously admitted in some other court, shall also specify the court in which he has been so admitted, and the time; which shall be filed with the proper officer, and shall be produced and openly read in court, before he shall be inrolled and registered. *f. 3.*

Persons having paid the duty of 100 l. need pay no further duty.

Provided, that any person who shall be admitted in any of the courts at *Westminster*, and who shall have paid the duty of 100 l. may be admitted in any other of the before mentioned courts without payment of any further duty. *f. 5.*

New contracts with other masters, not subject to further duty.

Provided also, that attornied clerks having paid the duty by this act imposed, upon the event of such attorney or solicitor to which he was bound dying, or leaving off practice, or of such articles being cancelled or discharged, or on any other event before the end of the 5. years, shall not be subject to any further duty, for any new contracts with other masters. *f. 8.*

To have no more than two clerks.

No attorney or solicitor shall have more than two clerks at any one time. 2 G. 2. c. 23. *f. 15.*

Except the prothonotaries in the common pleas, and the secondary in the king's bench, and the several prothonotaries in the counties palatine, and great sessions in Wales; each of whom may have three, who shall be bound and serve for such time as aforesaid, and examined, admitted, and inrolled, as other persons who have served to a sworn attorney. *f. 16.*

Attorney may be admitted a solicitor.

A sworn attorney may, on examination as aforesaid, be admitted, sworn, and inrolled a solicitor, in any of the courts of equity, without fee or stamp. *f. 20.*

Solicitor may be admitted an attorney.

In like manner, a sworn solicitor may be admitted, sworn, and inrolled an attorney, in the king's bench or common pleas. 23 G. 2. c. 26. *f. 15.*

May be admitted in other courts.

So also, a sworn solicitor in any of the courts of equity may, on examination as aforesaid, be admitted, sworn, and inrolled, in any other court of equity, without fee or stamp. 2 G. 2. c. 23. *f. 21.*

May act in the name of any other attorney.

And any attorney or solicitor in any of the courts respectively, may, with the consent in writing of an attorney in any other court, in the name of such attorney, sue out any process, and carry on any suit, in such court; notwithstanding he is not sworn and admitted to be an attorney of such court. *f. 10.*

And

And any person, who hath been admitted an attorney in any of his majesty's courts of record at Westminster, shall be capable of being admitted to practise as an attorney in any inferior court of record; provided he be in all other respects qualified according to the custom of such inferior court. 6 G. 2. c. 27.

May act in inferior courts of record.

No person shall act as attorney, solicitor, or agent, at any general or quarter sessions of the peace, without being duly inrolled; on pain of 50 l. to him who shall sue in twelve months, with treble costs: and if any attorney or solicitor shall permit him to make use of his name in such sessions, he shall forfeit 50 l. in like manner, 22 G. 2. c. 46. s. 12.

Persons unqualified not to act in the sessions.

And no clerk of the peace or his deputy, or any undersheriff or his deputy, shall act as solicitor, attorney, or agent, at any general or quarter sessions of the peace of the county or place where he shall execute his said office respectively, on pain of 50 l. in like manner. s. 14.

A person acting as attorney or solicitor in the county court, without having been legally admitted; shall forfeit 20 l. with costs, to him who shall sue in 12 months in any of his majesty's courts of record. 12 G. 2. c. 13. s. 7.

Nor in the county court.

An attorney, in respect of his attendance at the court, cannot be pressed for a soldier. *Comyns's Dig. Attorney.*—But he is not privileged from serving in the militia, or finding a substitute in his stead. *Black. Rep.* 1123.

Privilege.

An attorney shall not be made constable, though there be a custom that every inhabitant shall be chosen in his turn. *Comyns ib.*

And, in general, it is said, that he shall not be elected into any other office, against his will; as, to the office of overseer of the poor, or churchwarden, or any office within a borough. *Id.*

So he shall not be chosen collector of the lord's rent within a manor, where it is copyhold; though it be part of his tenure. *Id.*

So he shall not be amerced for not doing his suit at the lord's court, when his attendance at *Westminster* is required. *Id.*

In the case of the corporation of *Norwich v. Berry*, T. 7 G. 3. it was determined, that an attorney ought to have his privilege allowed from executing the office of sheriff. It was observed, that the contest was not between the city of *Norwich* and the attorney, but between the city of *Norwich* and the court of common pleas; that the privilege of the court was the matter in question, which

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has existed as long as the court; and the crown could not, by a charter granted to a corporation, take it away. *Burr. Mansf.* 2109.

If an attorney be denied his privilege, he may have a writ of privilege for his discharge. 2 *Haw.* 63.

Misbehaviour.

If any attorney be notoriously found in any default, of record, or otherwise; he shall forswear the court, and never after be received to make any suit in any court of the king. 4 *H. 4. c.* 18.

And therefore, where an attorney sued out a *capias*, without an original; he was struck out of the roll, and sworn, that he be not an attorney in any of the king's courts. *Comyns's Dig.* Attorney.

So an attorney, who gave names to the sheriff to be returned upon a jury, was cast over the bar. *Id.*

So if he takes money of his client, and afterwards wholly refuses to intermeddle with his business; he shall be struck out of the roll. *Id.*

If he refuse a re-delivery of writings intrusted to his perusal, though some of them concern himself principally; the court, upon motion, will compel him to re-deliver them, on payment of all due to him in the cause for which they were delivered; for if the writings were delivered for a special purpose, he shall not detain them for another demand. *Id.*

And the court will award an attachment against him, for bad and fraudulent practice; and he shall pay costs thereupon, or shall be committed: But an attachment will not be granted before a day allowed to shew cause. *Id.*

Acting when
under confinement.

No attorney or solicitor, being a prisoner, shall, in his own name, or in the name of any other attorney, during his confinement, sue out any writ or process, or commence any action; on pain that such proceedings shall be void, and he shall be incapacitated to act as attorney or solicitor for the future; and any attorney or solicitor permitting or empowering him to do so in his name, shall be in like manner incapacitated. 12 *G. 2. c.* 13. *f.* 9.

Provided, that such person so confined may carry on or transact any suit commenced before his confinement. *f.* 10.

Name to be in-
scribed on writs
or other process.

Every writ or process for arresting the body, and every writ of execution, or some label annexed to such writ or process, and every warrant to be made out thereupon, shall be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor; and where such person shall not be immediately employed by the plaintiff, then also

also with the name of the attorney or solicitor immediately employed: And every copy of any writ to be served on the defendant shall be subscribed or indorsed, with the name of the attorney or solicitor immediately employed. 2 G. 2. c. 23. s. 22.

But the not subscribing or indorsing the name of the attorney, clerk in court, or solicitor, on the warrant made out on the process, shall not vitiate the same; provided the writ be subscribed or indorsed: but the sheriff making out such warrant, and not subscribing or indorsing the name of the attorney, clerk in court, or solicitor, who sued out the same, shall forfeit 5l; to be assessed upon him as a fine, by the court out of which the process issued, half to the king, and half to the party aggrieved by such omission. 12 G. 2. c. 13. s. 4.

If any sworn attorney or solicitor shall knowingly act as agent for any person not qualified; he shall, on proof thereof to the court in a summary way, be struck off the roll and incapacitated; and such unqualified person shall be committed to the prison of the court, for any time not exceeding one year. 22 G. 2. c. 46. s. 11.

Acting for a person unqualified.

If any sworn attorney shall knowingly suffer any person, not being a sworn attorney or solicitor, to act in his name; he shall be incapable to act as an attorney. 2 G. 2. c. 23. s. 17.

Suffering a person unqualified to act in his name.

If any attorney or solicitor shall willingly delay his client's suit, to work his own gain; the party grieved shall have his action for the same, and recover costs and treble damages; and the said attorney or solicitor shall be discharged from being an attorney or solicitor any more. 3 J. c. 7.

Suffering wilful delay.

In the case of *Ruffel and Stewart, M. 6 G. 3.* The defendant being a prisoner, the plaintiff's attorney had neglected to charge him in custody within the time limited for his discharge upon common bail; whereupon the plaintiff brought an action against the attorney, and recovered against him 1500l. damages. *Burr. Mansf. 1788.*

All attorneys and solicitors shall give a true bill unto their clients subscribed with their own hands and names, before they shall charge their clients with their fees or charges. 3 J. c. 7.

To deliver a bill signed.

And if any attorney or solicitor shall demand by his bill any other sum of money, or allowance upon his account of any money, which he hath not laid out; the party grieved shall have his action for the same, and recover costs

Penalty for a wrong charge.

costs and treble damages; and such attorney or solicitor shall be discharged and incapacitated. *Id.*

Client to have a month to pay in. No attorney or solicitor shall sue for recovery of his fees, until after one month from the time of delivering the bill signed. 2 G. 2. c. 23. s. 23.

Taxation.

And the client, on submission to pay the whole sum that on taxation shall appear due, may have the bill taxed by the proper officer. And if the attorney or solicitor, or the party charged, having due notice, shall not attend the taxation; the officer may proceed to tax the bill *ex parte*: (And no suit shall be commenced for the said fees during the taxation.) And on taxation and settlement of the bill, the party shall forthwith pay to the said attorney or solicitor, or to any person by him authorized who shall be present at the taxation, or otherwise as the court shall direct, the whole sum that shall be found due; and in default thereof, the party shall be liable to an attachment, or to such proceedings at the election of the attorney or solicitor as the party shall be otherwise liable to by law. And if it appear on the taxation, that the attorney or solicitor hath been overpaid; he shall forthwith refund, on pain of attachment, or such other proceedings as aforesaid. If the bill taxed be less by a sixth part than the bill delivered; the attorney or solicitor shall pay the costs of taxation: But if it shall not be less, the court shall in their discretion charge the attorney or client, according to the reasonableness or unreasonableness of the bill. s. 23.

Provided, that the said act shall not extend to any bill of fees due from any attorney or solicitor, to any other attorney or solicitor or clerk in court; but they may use such remedies for the recovery thereof, as they might have done before the making of the said act. 12 G. 2. c. 23. s. 6.

In what case the attorney himself shall pay costs.

In some cases the attorney himself shall be liable to pay costs. As in the case of the *King and Fielding*, M. 32 G. 2. On shewing cause why an information should not be granted against Mr. *Fielding*, for a misdemeanour in his office of a justice of the peace; the complaint appeared to be frivolous and vexatious: so that the justice ought to have the costs he had been put to in defending himself against it. The only question was, who should pay them. — The complaint was made on a joint affidavit made by the prosecutor (one *Taylor*), and his attorney (Mr. *Callaghan*): Which attorney (as was proved on oath) had also

also declared, that if it should cost him 100l. he would lay *Fielding* by the heels.—It was strongly urged on the behalf of Mr *Callaghan*, that it would be a very great discouragement to attornies, in the course of their practice, if they were to be made personally liable to costs, in case their clients motions should not succeed; which motions they had engaged in, at the application of their clients, and upon facts represented to them by their clients, as being true and candidly stated; and which they themselves could not know or suspect to be otherwise: and that it would be still more hard upon them, to do this without hearing what they could urge in their own defence.—But the court were clear and unanimous, that in this case, they might and ought to do it; because Mr. *Callaghan* not only appeared as prosecutor, by joining in the original affidavit of complaint; but had also expressly declared, that if it should cost him 100l. he would lay *Fielding* by the heels. Therefore they discharged the rule with costs, to be paid by Mr. *Taylor* and Mr. *Callaghan*. Burr. *Manf.* 654.

Auction, duty on. See *Exrife*.

Award.

IT is judged not foreign to the office of a keeper of the peace, to have some knowledge of the law contained under this title: Concerning which we will shew,

- I. *What things may be submitted to arbitration.*
- II. *The several kinds of submission to arbitration.*
- III. *The award; and therein what shall be deemed a good award, and what not.*

I. *What things may be submitted to arbitration.*

It is held clearly, that all matters of controversy, either of fact, or of a right in things and actions personal and uncertain, may be submitted to arbitration. 9 Co. 78.

Actions personal.

Matters of freehold, or any right and title to a freehold, cannot be submitted to arbitrament; for a freehold is not transferrable from one to another, without livery and seisin: Yet if there be a submission concerning the right, title, or possession of lands and tenements, and the parties enter

Matters of freehold.

enter into mutual bonds, to stand to the award made relating to them, they forfeit their bonds unless they obey it. 1 *Roll. Abr.* 242. 244. *Read. Arb. Wood. b. 4. c. 3.*

So if the condition of an obligation is, to stand to an award touching lands; and the arbitrator awards the land to one, and that the other shall release to him: if he doth not release, the obligation is forfeited. 1 *Bac. Abr. Arbitrament.*

But if the arbitrator awards the land to one, it seems the obligation is not forfeited, tho' the other do not convey to him to make him a good title; for the arbitrator hath not awarded any act to be done by the party, and the award itself cannot transfer the right, and so must be void, and then the condition of the obligation cannot be forfeited: for the awarding the land to one, cannot be expounded, that the other shall infeoff him. *Id.*

And altho' there be no bond, yet if the arbitrator do award that the one shall infeoff the other; it seems that an action on the case may be maintained for not doing it: for the award in itself is as good as if there were a bond, and then there is the same reason an action should lie, as that the condition of the obligation should be forfeited; for if such an award were void, then the condition of the obligation to perform it could not be broken. *Id.*

In like manner, an *annuity* is not determinable by award; for it is reckoned in nature of a freehold, and therefore cannot pass without the deed of the party. *Id.*

So a *partition* cannot be made by award; for a freehold cannot pass (as was said) without livery and seisin. *Id.*

It hath been doubted, whether leases for years, being *chattels real*, could be transferred by award; therefore it seems safest, when the controversy relates to these, that the parties be bound in mutual obligations to perform the award; and then, if the arbitrators award, that one shall assign or transfer the lease to the other; if he refuseth, he forfeits his obligation. *Id.*

Matters of record.

Debts on arrearsages of accounts before auditors shall not be discharged by award; because it appears of record, and must be discharged by matters of as high a nature, 1 *Bac. Abr. Arbitrament.*

Debts due by specialty.

Debts due by specialty cannot be discharged by a bare award; but if the submission was by bond, the award would be a good bar; for one specialty may be dissolved by another. *Id.*

A thing certain.

A certain and fixed debt is not discharged by an award; for the end and design of an arbitration is, to reduce uncertain

certain debts and duties to a certainty: and to award a man a certain debt, is to give him no more, nor do any greater thing for him, than was done before; for now he can have but an action, and that he might have before; and to give him less than he had before, is to do him a manifest injustice, which the arbitrator cannot do. *Id.*

But if 20 l. be due to a man, and he and another submit all personal things to arbitration; there, if the arbitrator award 10 l. it is a good award: because there were other uncertain things submitted, and the arbitrator had consideration of all, and set one against the other in making the award; so as perhaps the debt of 20 l. was diminished, in consideration of some trespasses done by him to the other party. *Id.*

Criminal matters, as treasons, murders, felonies, and other offences indictable at the suit of the king, cannot be submitted to arbitrament; for it is for the good of the commonwealth, that such offenders be made known and punished: and the king in such cases is a party, for whom the other parties cannot undertake. And altho' the submission be by bond, yet the obligation is void; and the parties may be punished for entering into such bonds. *Id.*

Criminal offences.

But if the party injured proceeds by way of action, as he may in assaults and batteries, libels, and the like; the damages he sustained or expects to recover may be submitted to arbitration: for in such case the action is for himself, and not for the king. *Complait Arbitrator. 28.*

Also matrimonial causes, or any thing concerning the contract or dissolution of marriage, cannot be submitted to arbitrament. *1 Roll's Abr. 252.*

Matrimonial causes.

But the damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. *16 Ed. 4. 2.*

II. The several kinds of submission to arbitration.

A submission by words is good, and the party in whose favour the award is made, hath a remedy to enforce a performance of it: Yet it is not expedient that any submission should be by parol, because the party may revoke it at pleasure, at any time before the award made, and that by word likewise; and the judges will rarely enforce the performance of an award, when either the submission or the award is by parol, because it lays so great a foundation for perjury. *Compl. Abr. 21.*

By parol.

Submission may also be by covenant; but this method is seldom used; for tho' it contains the same certainty with a bond,

By covenant.

a bond, yet the method of suing on a covenant is different, and more difficult than in suing on a bond. *Id.* 7, 46.

By rule of court.

Submission by *rule of court* (A) is made in pursuance of the statute 9 & 10 W. c. 15. which enacteth as follows:

It shall be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action, or suit in equity) by arbitration, to agree that their submission to the award or umpirage be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they submit themselves: Which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court: and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by such arbitration or umpirage; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court; and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order of any other court of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award was procured by corruption, or other undue means.

And this is allowed to be the most expeditious way; and the method is to get a counsel to move in any of the courts to have it made a rule, which in such case is never denied: and then the party is liable to the same penalties that he would be for disobeying any other rule of court. *Compl. Arb.* 6, 47.

By bond,

Or lastly, the submission may be by bond (B). In which case each party must give to the other a bond; which bond, and condition, must contain exactly the same words, only changing the names of the parties. And the penalty of the bond should at least be the value of the thing submitted; so that the party may rather abide by the award, than forfeit his obligation. *Id.* 46.

And undoubtedly a submission by bond, in some respects, exceeds a submission by rule of court: for an award made pursuant to bonds of submission, may bind the parties executors; but if the party who refuses to perform an award made pursuant to a rule, of court, shall die, the act of parliament directing, that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost likewise. *Id.* 34.

Sometimes the submission is both by bond and rule of court, by adding the parties consent at the bottom of the condition of the bond; and this is still the best way, for then the party may proceed which way he pleases: and it is said, that he may proceed both ways; that is to say, both on the bond, and have an attachment likewise for the contempt. 1 *Salk.* 73.

Both by bond
and rule of
court.

It hath been usual also of late years, to insert in the submission a clause that no bill in equity shall be filed against the arbitrators: which restriction will be a bar against such bill being brought. As in the case of *Lingood and Groucher*, Aug. 6, 1742; One condition of the submission was, that the parties should be restrained from preferring a bill in equity against the arbitrators. And on a bill being brought, the submission was pleaded in bar. And by the lord chancellor *Hardwick*: the plea must be allowed. And he mentioned a case of one Mr. *Robins* in lord chancellor *King*'s time, who, being appointed arbitrator by the court, accepted of it with a proviso that the parties would enter into a rule not to bring a bill in equity, which was done accordingly: notwithstanding which, the party against whom the award was made brought a bill against the arbitrator, and charged corruption and partiality. Upon which Mr. *Robins* moved that he might be struck out from being a party to the cause. His lordship granted the motion, and said it would be a very great hardship upon arbitrators if they should be harassed with suits, and the allowing them to be liable to such suits would effectually discourage persons of worth from accepting the office of arbitrators. And therefore he struck him out from being a party. 2 *Atkyns*, 395.

Restriction a-
gainst filing a
bill in equity.

But in which way soever the submission is made, the same nevertheless may be revoked, tho' made irrevocable by the strongest words; for a man cannot by his own act, make such authority or power not countermandable, which by the law and in its own nature is countermandable. 8 *Co.* 82.

Whether the
submission may
be counter-
manded.

But

But if the submission be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he shall stand to and abide the award. And if he revokes, he must likewise give notice of the revocation; and if the submission was by bond, the revocation must be in writing. 8 Co. 82.

And if the submission be made a rule of court pursuant to the act of parliament; if either of the parties revokes, the court will grant an attachment. *Compl. Arb.* 82.

But if the submission be by word, the party may revoke at pleasure, and he forfeits nothing; but he must in this case likewise give notice of the revocation, tho' it need not be in writing: and the notice must be to the arbitrators themselves. 8 Co. 82.

III. The award (C); and therein what shall be deemed a good award, and what not.

Arbitrators cannot administer an oath.

The arbitrators cannot injoin an oath to the witnesses, there being no law which gives them any such power.

Award best to be in writing.

It is highly convenient that the award be in writing, and so to be mentioned in the submission. *Compl. Arb.* 34.

And upon stamp.

By the 23 G. 3. c. 58. Every award in writing shall be on a 5 s. stamp.

Award to be according to the submission.

One thing essential to a good award is, that it be made, with respect to persons and things, according to the submission. *Wood. b. 4. c. 3.*

Upon which ground, as the arbitrators are, with respect to the things submitted, circumscribed and tied down to the submission; so in several cases it has been disputed, whether their awarding releases to the time of the award, and not to the time of the submission, was good; it is therefore most adviseable to award releases to the time of the submission; tho' it is now clearly held, that general releases shall extend only to the time of the submission, and that if there be releases awarded to the time of the award, they shall be good, unless it be shewn on the other side, that some new matter hath arisen between the parties between the submission and award. 1 *Roll. Abr.* 242. 6 *Mod.* 34.

That is to say, an award of releases to the time of making the award, includes all that is within the submission,

tion, and more; which shall be good for so much as is within the submission, and void for the residue. 1 *Bac. Abr. Arbitrament.*

If the submission be of *all matters in difference*, the arbitrators, in disputes between two partners, may dissolve the *partnership*. As in the case of *Green and Waring*, T. 4 G. 3. It was moved to set aside an award between two partners, because the arbitrator, amongst other particulars, had directed the partnership to be dissolved; which, it was argued, was exceeding his power. But by the court; when all matters in difference were referred he had clearly a power to dissolve it. If a difference between a master and apprentice were referred, the arbitrators would have a power to order the indentures to be delivered up. And although it was sworn, that at the trial of this cause, when the rule of reference was drawn up generally in the usual form, referring *all matters in difference*, the plaintiff openly declared, that he would not have it understood that the arbitrator had a power to dissolve the partnership, *L. Mansfield* observed, that this is sufficient evidence, from the party's own mouth, that the dissolution of the partnership was then a *matter in difference*. And the rule for setting aside the award was discharged. *Black. Rep. 475.*

If the submission be, *so as the award be ready to be delivered to the parties, or to such of them as shall desire the same*, the parties so bound are themselves obliged to take notice of the award at their peril; but if the words of the submission be, *so that the award be delivered to each party by such a day*, then it must be delivered to each party accordingly. *Read. Arb. Wood. b. 4. c. 3.*

But tho' the words of the submission may be such, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties shall do an act, which depends upon another, first to be done of the other party, he must have notice of it; at least the party who would take advantage of it, must shew that he hath done what was necessary on his part. *Compl. Arb. 12.*

An award that one shall pay for the writings of the award, or the reckoning in the house where the award was made, is a void award; for such things are plainly out of the submission. 1 *Roll. Abr. 254.*

Also, it is required, that the award be beneficial, and appoint something advantageous to either party; for an award of one side only, is not good: so if an award be

Award to be beneficial to either party.

Award.

that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Wood. b. 4. c. 3.*

So if a man and woman submit themselves to an award, it is no good award that they shall *intermarry*, for this is not intended any advantage. *1 Rol. Abr. 252.* And the bodies of the parties are not submitted to arbitration. *1 Bac. Abr. Arbitrament.*

Where an award was, that the defendant should pay to the plaintiff two sums at several times, and that several releases should be given presently; it was objected, that by giving such releases the bond and money would be discharged, and therefore the awarding the release was void against the plaintiff, and so there is nothing of his side to be done: And of this opinion was the court. But where the award was, that money should be paid at two several days, and releases given, so that it appears by the very method and order of the award, that the general releases were not to be given till after the money paid; the court were clear of opinion, that it was well enough, and so judgment was given for the plaintiff. *2 Mod. 169.*

Award to be
possible and
lawful.

Also it is required in a good award, that it be possible and lawful. *Wood. b. 4. c. 3.*

Thus, if an award be, that one of the parties shall kill, steal, forge a deed, or the like, it is void. *1 Inst. 206.*

In like manner, if it be awarded, that money shall be paid to an infant, and that he shall make a release, it is void; for the infant's release is not good in law.

Also it is held, that where a thing is awarded to be done, which afterwards becomes impossible by the act of God, the party is excused; as if an award be, to deliver a horse before such a day, and he dies before that day. *21 Ed. 4. 70.*

Award to be
certain and
final.

Also it is required, that the award be certain and final. *Wood. b. 4. c. 3.*

Upon which ground it hath been resolved, that if the arbitrators award, that one of the parties beg the other's pardon before such a mayor, or such and such persons, it is good and certain enough; but if the award be, that he shall beg pardon in such manner and in such place as the other party shall appoint, it is not good: for the arbitrators are to determine, and not to make such party his own judge in his own cause. And tho' the time and place be but circumstances, yet in this sort of satisfaction they make the most considerable part. *1 Salk. 71.*

Upon which ground also, the arbitrators cannot regularly reserve any thing for their future judgment, when

the time allowed them is expired; for then such their award is not certain and final. *Cro. Jac.* 585.

An award that the defendant shall *give security* to the plaintiff, for payment of a sum of money, is void for the uncertainty; not shewing what security he should give, whether by bond or otherwise. *Id.* 314.

In the case of *Winter and Garlick, T. 3 An.* it was awarded, that the defendant should pay to the plaintiff 10l. and all the *costs* of a suit then depending in an inferior court, and afterwards to give mutual releases. By the court: An award to pay such costs as the master shall tax is good, because it may be reduced to a certainty; but this is uncertain, and carries it farther than has hitherto been allowed. And *Holt Ch. J.* said, that it hath been held a good award, to pay such costs as the prothonotary shall tax, and that carries it far enough; but that surely the arbitrators should either ascertain it themselves, or refer it to a proper officer. *1 Salk.* 75-6 *Med.* 195.

But in the case of *Dudley and Nettleford, H. 13 G.* where it was awarded, that the plaintiff should pay the costs, and nobody was appointed to tax them, the court supplied it by ordering the master to do it. *Str.* 737.

And in the case of *Hawkins v. Colclough, B. 30 G. 2.* *L. Mansfield* said, that awards are now considered with greater latitude and less strictness, than they were formerly; and it is right that they should be so, because they are made by judges of the parties own chusing. And this was in the case of an award made by a cobbler, upon a submission of all disputes; which award was in these words, "Whereas there has been a suit at law between the parties, that has run to a great expence on both sides, and it being left to me to make an end of it: I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff 5 s. for his making the first breach in the law." And the award was held to be sufficiently certain and final. *Burr. Mansf.* 274.

And in the case of *Lucas and Wilson, M. 32 G. 2.* *L. Mansfield* said, the court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators. *Burr. Mansf.* 701.

And in the case of *Tissotson and Peat*, in the chancery, July 1, 1747, *L. Hardwicke* said, the only ground to impeach an award is collusion, or gross misbehaviour in the

arbitrators; for otherwise it is final and binding upon all parties, or else no persons would ever undertake to be arbitrators. And a plea of an award is good, not only to the merits of the case but also to a discovery; for a defendant to the bill is not obliged to set out the whole account between him and the plaintiff after an award in his favour, for that it is conclusive to all the parties, till an error is shewn in taking the account, or partiality and improper behaviour in the arbitrators.—— And in another case, *July 30, 1748*, a bill was brought to set aside an award, and the arbitrator was made a party, and the bill sought a discovery from him of the grounds on which he made his award, and to set it forth minutely in his answer. But by *L. Hardwicke*, unless there is corruption or partiality in an arbitrator, the party cannot set aside his award; and if it should be allowed to make arbitrators defendants, and give them all this trouble to set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference: If there was a palpable mistake made by an arbitrator, or miscalculation in an account that had been laid before him, the party aggrieved might bring his bill against the party in whose favour the award was made, to have it rectified, and not against the arbitrator. And his lordship said, he did not know whether there was any established rule of the court with regard to arbitrators setting forth the reasons of their award, and how far they were obliged to discover, and how far not; but if there was none, he should not scruple to make one, because it would be unreasonable to put an arbitrator to so much trouble and expence, as such an answer must necessarily give him. *3 Atk. 529, 644.*

Arbitrators cannot proceed after appointing an umpire.

It is settled that arbitrators cannot proceed on a reference, after they have once named an umpire; for then their authority ceaseth, tho' the time for making the award is not expired. *Rep. of Praet. in C. B. 116. Danes and Monsay. E. 8 G. 2.*

At what time an umpire may be appointed.

But the appointment of an umpire before their own time for making an award is expired, may be good; As in the case of *Deyley and Pitsoe, T. 28 G. 2.* An action of debt was brought upon a bond, conditioned, that the parties should submit to the award of two arbitrators, provided they made their award on or before the 13th of *March* next; and if they made no award, then that they should appoint an umpire before the 17th of the said *March.*

March. The defendant pleaded, that no award was made on or before the said 13th day of *March*; but that they did, before the said 17th of *March*, to wit, upon the 11th, chuse and appoint an umpire, who had made an award. By the court: There are no words, which by any construction can be intended to limit or circumscribe the election of an umpire till after the 13th of *March*. The plain sense of the submission is, that they should make their award by a certain day; or in case they did not make it, or could not agree, that then they should nominate an umpire. And they said, the court has not been nice in construing the time of the umpire's appointment, provided it was soon enough for him to make his award. M. S.

E. 4 G. 3. Soulsby and Hadgson. An action of debt was brought upon an arbitration bond. The arbitrators were to chuse an umpire, in case they themselves should not agree within a limited time. They did not agree within the limited time, but chose an umpire. The umpire accordingly made an umpirage: and they joined in it. The only question was, whether the umpirage was duly made according to the power given to the umpire: Or whether it was vitiated and rendered void, by the arbitrators joining in it. The court were unanimous and clear, That this was the umpirage of the umpire only. He was at liberty to take what advice, or opinion, or assistants he pleased; and the joining of the arbitrators was only surpluage. *Burr. Manif. 1474. Black. Rep. 463.*

The arbitrators joining with the umpire in making the award.

E. 32 G. 3. Hall v. Lawrence. The parties having referred all matters in difference to the award of two arbitrators, or in case of their disagreeing, of an umpire, the arbitrators regularly heard all the evidence, but disagreeing, stated this evidence to the umpire, on which he made his award without re-examining the witnesses. After he had made the award, the party against whom it was made applied to him to hear the evidence himself, and on his refusing, moved the court to set aside the award: But the court thought that, as no application was made to the umpire to examine the witnesses before he had made his award, the rule should be discharged with costs. *Durnf. and East, 4 V. 589.*

An umpire may receive the evidence from the arbitrators, on-
less required to re-examine the witnesses before making his award.

Generally (as is aforesaid) the award shall be expounded according to the intent of the arbitrators, and not literally, and shall not be unravelled in a court of equity, unless there was corruption in the arbitrators.

Award to be construed favourably, except in case of partiality or corruption.

But in the case of corruption, or other unfair practice, it is enacted by the aforesaid statute of 9 & 10 W. c. 15. that any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and accordingly be set aside by any court of law or equity, so as complaint thereof be made in the court where the rule is made, before the last day of the next term after publishing the arbitration. *f. 2.*

But otherwise, as the arbitrators are persons of the parties own chusing, and as the law presumes that every man will be so wise as to pitch upon a person whose understanding and honesty he can rely on; it hath seldom happened, that an award was held void when there appeared nothing else to vitiate it: yet awards have been, and are often set aside in a court of equity, for corruption and want of understanding in the arbitrators. *Compl. Arb. 73.*

Therefore it is the interest of both parties, to chuse men of honesty and understanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon; for if they appear to be mistaken in a matter of fact, a court of equity will set aside the award. *2 Vern. 705.*

So if the arbitrators, or any of them, appear to have been deceived: As where certain articles were shewn only to one of the arbitrators, and he to whom they were not shewn swore that if he had seen them, he believed he should not have made such an award. For in such case, the award (according to the expression in the statute) is procured by *undue means*. *1 Atkyns, 64.*

If a submission is to three arbitrators; or any two of them, and two of them by fraud or force will exclude the other; that alone is sufficient to vitiate the award: or if they have private meetings, and admit one of the parties, but give no notice to the other, but suffer the attorney of the party whom they admitted, to draw up the award; such award shall be set aside for partiality and unfairness. *2 Vern. 514.*

It is a general rule in equity, that when it appears that any one of the arbitrators was any way *interested* in the matters in controversy, the award is to be set aside. *Compl. Arb. 75.*

And it is the strongest argument of partiality, to shew that the arbitrators received from either of the parties any considerable sum of money, or any other present which may be a temptation to act corruptly; but the sum or present must be proved to be so exorbitant, as to induce the

the court to believe that it biased their judgments; otherwise it will be of no effect. *Compl. Arb.* 76.

In the case of *Shepherd and Brand*, T. 7 G. 2. On a rule to shew cause why an award should not be set aside, one exception was, that before making the award, the arbitrators insisted upon three guineas apiece to be paid to them by each of the parties for their trouble and expences; that the defendant refused doing it on his part, upon which the plaintiff paid the whole money: By the court; Where arbitrators, let their characters be otherwise never so unexceptionable, take money of one of the parties singly, whether for charges or any thing else, before making their award, as this is a matter of so tender a nature that even the appearance of evil is to be avoided, and this practice may be of dangerous example, it is sufficient cause to set aside the award; for if this should be suffered, it will be hard to distinguish what is corruption. 2 *Barnardist.* 463. *Cases in the time of L. Hardwicke*, 54.

In the case of *Lingood and Croucher* abovementioned, L. *Hardwicke* said he remembered an instance in a famous case of *John Ward*, who being a party in a cause where one *John Warner* was an arbitrator, upon *Ward's* coming into the room he said, I *John Warner* will make you *John Ward* pay costs. *Ward* complained to the court of this partial behaviour in the arbitrator; and the court inverted *Warner's* threats, for they made *Warner* pay costs to *John Ward*. 2 *Atk.* 396.

If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. 2 *Brown.* 311.

If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded; and the party must make affidavit of such demand, before he can have an attachment. 1 *Salk.* 83.

If a sum of money be awarded to one of the parties, and that upon the payment thereof they both shall give mutual releases; if he who is to receive the money, refuses it, yet upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. 1 *Salk.* 75.

Where the award appoints no time, the thing is to be done immediately.

Demand to be before attachment.

On tender and refusal, the party refusing shall nevertheless sign a release.

A. Form of a submission by rule of court.

*W*HEREAS divers disputes and controversies have arisen, and are now depending, between A. B. of — in the county of — yeoman, of the one part, and C. D. of — in the said county, yeoman, of the other part; Now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them shall be referred and submitted to the arbitrament, final end, and determination of A. A. of — in the said county, gentleman, B. A. of — in the said county, yeoman, and C. A. of — in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the — day of — next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of his majesty's court of king's bench at Westminster. In witness whereof the said parties to these presents have hereunto set their hands this — day of — in the — year, &c.

B. Arbitration bond.

*K*NOW all men by these presents, that I A. B. of — in the county of — gentleman, am held and firmly bound to C. D. of — in the said county of — yeoman, in — pounds, of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain attorney, his executors, administrators, or assigns: To which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the — day of — in the — year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our Lord —.

Condition to stand to the award of two arbitrators, in common form.

*T*HE condition of the above obligation is such, that if the above bound A. B. his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform,

form, observe and keep the award, order, arbitrament, final end and determination of A. A. of ——— esquire, and B. A. of ——— gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the abovebound A. B. as of the above named C. D. to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing, and ready to be delivered to the said parties, on or before the ——— day of ——— now next ensuing; [and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer or cause to be preferred, any bill in equity against the said A. A. and B. A. or either of them, for or concerning their award in the premises;] Then this obligation to be void, otherwise of force.

If the parties have a mind to make their submission a rule of court, then this may be added:

And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made and provided.

Condition to stand to the award of three arbitrators, or any two of them, and an umpire appointed.

THE condition of this obligation is such, that if the abovebound A. B. his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of ——— or any two of them; arbitrators indifferently elected and named, as well by and on the part and behalf of the said A. B. as by and on the part and behalf of the above named C. D. to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time heretofore

Award.

heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the ——— day of ——— now next ensuing; then this obligation to be void, otherwise of force.

And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said A. B. his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage [if the umpire be named] of ——— being a person indifferently named and chosen between the said parties for umpire; [if not named] of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premises; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the ——— day of ——— now next ensuing; and if the said A. B. his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity, against them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire on the premises: Then this obligation to be void, otherwise of force.

[And the abovebound A. B. doth agree and desire, that this his submission be made a rule of his majesty's court of king's bench at Westminster, pursuant to the act of parliament in such case made.]

C. Form of an award.

TO all to whom these presents shall come, we A. B. of ——— and C. D. of ——— do send greeting.

Whereas there are several accounts depending, and divers controversies have arisen, between ——— of ——— yeoman, of the one part, and ——— of ——— yeoman, of the other part: and whereas, for the putting an end to the said differences, they the said ——— and ——— by their several bonds or obligations bearing date ——— last past, are reciprocally become bound each to the other, in the penal sum of ——— to stand to, abide, perform, and keep the awards, order and final determination of us the said ——— so as the said award be made in writing, and ready to be delivered to the parties in difference on or before ——— next ensuing, as by the said obligations

Award.

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gations and conditions thereof may appear : Now know ye, that we the said arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties in manner following ; that is to say, First, we do award and order, that all actions, suits, quarrels and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever touching the said premisses, to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in anywise relating to, or concerning the premisses. And we do also award and order, that the said ——— shall deliver or cause to be delivered to the said ——— at ——— within the space of ——— &c. And further, we do hereby award and order, that the said ——— shall on or before ——— pay or cause to be paid unto the said ——— the sum of ——— We do also award and order, &c. And lastly, We do award and order, that the said ——— and ——— on payment of the said sum of ——— shall in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for the releasing by each to the other of them, his heirs, executors and administrators, of all actions, suits, arrests, quarrels, controversies, and demands whatsoever, touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the ——— day of ——— last past (viz. the day of the date of the arbitration bonds). In witness whereof we have hereunto set our hands and seals the ——— day of ———.

*Witnesses hereof,
E. F.
G. H.*

*A. B.
C. D.*

Form of an umpirage.

(RECITE the arbitration bonds, as before) *Now know ye, that I ——— umpire indifferently chosen by ——— having deliberately heard and understood the griefs, allegations, and proofs of both the said parties, and willing (as much as in me lieth) to set the said parties at unity and good accord, do by these presents arbitrate, award, order, decree, and judge as followeth ; That is to say, &c.*

Backing a Warrant. See ~~Warrant~~ Warrant.

Bail.

- I. *What it is.*
- II. *Difference between bail and mainprife.*
- III. *When a person may be discharged without bail.*
- IV. *Who may or may not be bailed.*
- V. *Who may bail, and the manner of it.*
- VI. *Requiring excessive bail.*
- VII. *Denying bail where it ought to be granted.*
- VIII. *Granting bail where it ought to be denied.*
- IX. *Of bail by writ of habeas corpus.*
- X. *Acknowledging bail in another man's name.*

I. *What it is.*

BAIL (from the French *bailler*, to deliver) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law. *Hale's Pl. 96.*

II. *Difference between bail and mainprife.*

The difference between bail and mainprife is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl. 96.*

III. *Where a person may be discharged without bail.*

If a person be brought before a justice, if it appears that no felony is committed, he may discharge him; but if a felony be committed, tho' it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him. *Hale's Pl. 98.*

IV. *Who may or may not be bailed.*

At the common law bail was allowed in all cases but homicide; but now the statute of the 3 Ed. 1. c. 15. directeth what offenders shall be bailed, and what not. *Hale's Pl. 97.*

It

It is true the said statute only prescribeth who shall or shall not be let to bail by the sheriff; but by the 1 & 2 P. & M. c. 12. it is enacted that no justice or justices of the peace shall let to bail or mainprise any person not replevisible by the said statute of 3 Ed. 1. c. 15.

Which statute is as follows: *Forasmuch as sheriffs and others, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable, and which not, but only those that were taken for the death of a man, or by commandment of the king, or his justices, or for the forest: It is provided, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manner, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living (if they be not of good name), and such as be taken for houseburning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ. But such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petit larceny that amounteth not above the value of 12 d. if they were not guilty of some other larceny aforesaid, or guilty of receipt of felons, or of commandment or force or of aid in felony done, or guilty of some other trespass for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed), shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.*

Sheriffs and others] That is to say, sheriffs and gaolers that have custody of gaols; so that this act extends not to any of the king's justices or judges of any superior courts of justice. 2 Inst. 185. But by a subsequent statute (as hath been said) it is extended to justices of the peace.

But only those, &c.] Here are first set down four sorts of persons which before this act were not bailable by the common writ *de homine replegiando*.

1. *Those that were taken for the death of a man]* By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed

Persons not bailable at common law.

Homicide.

committed to prison; but afterwards it was provided by parliament, that in case of homicide the offender was not bailable. 2 *Inst.* 186.

And even if a person have dangerously wounded another, the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender appear not, he is in danger of being severely fined. 1 *Haw.* 138.

And this statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self-defence; and it seems agreed, that justices of the peace, who have power at this day to bail a man arrested for a *light suspicion* of homicide, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear that he was guilty of the fact, let it be ever so plain that it cannot amount to murder. 2 *Haw.* 95. 105.

Commitments
by the king.

2. *Or by commandment of the king*] That is, by matter of record in one of his courts, according to law; and not an extrajudicial commandment. 2 *Inst.* 186, 187. So also it is provided in the petition of rights 3 *Car.* that no person shall be detained in prison by the king's special command, without cause certified.

And because some courts, as the king's bench, are before the king, and some before his justices, therefore the act saith, *by commandment of the king*, and the next words be, *or of his justices*. 2 *Inst.* 186.

Or by his justices.

3. *Or of his justices*] That is, of any of the courts of *Westminster*, or justices of assize. 2 *Haw.* 96.

Or for the forest.

4. *Or for the forest*] But as to imprisonment for offences in forests, the law hath been much mitigated by later statutes. 2 *Haw.* 98.

All these four are excepted out of the common writ *de homine replegiando*, that the sheriff in his county court, which is not a court of record, shall not replevy any of these four that are committed, although it should be by an unlawful commitment; but the superior courts at *Westminster*, upon an *habeas corpus*, shall do justice to the party in all these four cases. 2 *Inst.* 187.

Persons not repleviable.

Next the act doth further provide, that these kinds of prisoners hereafter following (being 13 in number) shall not be repleviable:

Outlaws.

1. *Such prisoners as before were outlawed*] Persons outlawed are *attainted* in law, and therefore are not bailable; for the intentment of the law is, that the person standeth indifferent whether he be guilty or no; and not if he be convicted or attainted. 2 *Inst.* 188.

2. *And*

2. *And they which have abjured the realm*] For these also Those who abjure the realm.
are attainted upon their own confession, and therefore not bailable at all by law. *Id.*

3. *Provers*] A provor, or *approver*, is a person that Provers.
confesseth the felony with which he is charged, and undertakes to *prove* another guilty of the same crime; which if he does, he saves his own life, otherwise he shall be immediately executed. And the reason why they are not bailable is, because they are guilty by their own confession, and therefore they do not stand indifferent. *Id.*

But this concerns not justices of the peace, because no man can become an approver before them, for that they cannot assign a coroner. *Hale's Pl.* 102.

4. *And such as be taken with the manner*] For in this Those taken
case likewise he standeth not indifferent whether he be With the mainer:
guilty or no, being taken with the *mainer*, that is, with the thing stolen as it were in his *hand*, anciently called *band habbnd*, and the like was anciently called *backberend*, as a bundle or fardle at his *back*; which was used to signify manifest theft. 2 *Inst.* 188.

5. *And those which have broken the king's prison*] Here Prison breakers.
are two offences; first, his breaking of the prison, for it is presumed that he who is innocent will never break prison: and secondly, his flying, because he confesseth the fact who flies from judgment. 2 *Inst.* 188.

6. *Thieves openly defamed and known*] Who, as it seems, Thieves openly
ought not to be bailed for any fresh felony, whereof there defamed.
is probable evidence against them. But this seems in a great measure to be left at the discretion of the person who has power to bail them, who on consideration of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable strongly to presume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

7. *Such as be appealed by provors so long as the provors be living (if they be not of good name)*] The appeal of the Persons appealed
approver is forcible against the appellee, because the by approvers.
approver confesseth himself guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee, so long as the approver liveth, unless the appellee be of good fame. 2 *Inst.* 188.

8. *And such as be taken for houseburning feloniously done*] Houseburners.
This was felony by the common law. *Id.*

9. *Or for false money*] This was treason by the com- Coiners.
mon law. *Id.*

10. *Or for counterfeiting the king's seal*] This was also Counterfeiting
treason by the common law. *Id.* the king's seal.

Persons excommunicate.

11. *Of persons excommunicate taken at the request of the bishop*] That is, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicate capiendo*, is not bailable: For in ancient times men were excommunicated but for heresies, or other heinous causes of ecclesiastical cognizance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the king's writ: but if the party offered sufficient caution *de parendo mandatis ecclesie in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered: And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery: Or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court hath no cognizance, he shall be delivered by the king's writ without any satisfaction. 2 Inst. 189.

Enormous offences.

12. *For manifest offences*] Which seems to be understood of inferior crimes of an enormous nature under the degree of felony; as dangerous riots, exorbitant rescoues, misprision of treason, præmunire, and such like heinous offences. Yet it seems to be in a great measure left to discretion, to judge in what cases their crime is so flagrant and enormous, that they ought not to have the benefit of it. 2 Haw. 99.

Treason.

13. *Of treason touching the king himself*] By the common law, a man accused or indicted of high treason, or of any felony whatsoever, was bailable upon good surety, until he were convicted; for at common law, the gaol was his pledge or surety, that could find none. 2 Inst. 189.

Shall be in no wise repleviable by the common writ, nor without writ] That is, the sheriff shall not replevy them by the common writ *de homine replegiando*; nor without writ, that is, *ex officio*: But all or any of these may be bailed in the king's bench. Id.

Persons bailable.

Next the act setteth down seven kinds of offenders that may be bailed:

Larceny by inquest taken.

1. *Such as be indicted of larceny by inquests taken before sheriffs or bailiffs*] That is before sheriffs in their towns, or lords in their leets, or those that have *insangthief* and *outsangthief*; that is, who have the privilege to judge thieves taken within their fee, or thieves dwelling within their manor and taken for felony out of their fee. Yet this is expounded that they be of good fame. 2 Inst. 190.

2. *Or of light suspicion*] But if the presumption be suspicion strong, or the defamation great; the justices may refuse to bail them. *Hale's Pl.* 102. And this is expounded also that they be of good fame. *Id.*

3. *Or for petit larceny that amounteth not above the value of 12 d. if they were not guilty of some other larceny aforesaid*] *Petit larceny* This act divideth larceny into two kinds; grand larceny, when the thing stolen is above the value of 12 d. and petit larceny when it is of the value of 12 d. or under. *2 Inst.* 189.

And it seems to be agreed, that there is no necessity that such persons be of good fame; yet upon the construction of the whole statute, if such persons be taken with the manner, or confess the fact, or their crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any colour of probability for their innocence, it seems most agreeable to the intention of the statute to bail them. *2 Haw.* 101.

4. *Or guilty of receipt of felons*] These are accessaries *Receiving felons.* after the fact. *2 H. H.* 100.

5. *Or of commandment or force or of aid in felony done*] *Aiding felons.* These are accessaries before the fact. *2 H. H.* 100.

But accessaries to felonies are not to be bailed, unless they be of good reputation: And it seems at this day to be settled, that where there are strong presumptions of guilt, such accessaries are not bailable by this statute. *2 Haw.* 102.

6. *Or guilty of some other trespass for which one ought not to lose life nor member*] *Trespasser.* But it seems reasonable to qualify the generality of this expression, with this limitation, that such accusation ought to be either on a light suspicion, or else that the offence be inconsiderable, or that it be not excluded from bail by some special act of parliament. *2 Haw.* 99. *2 H. H.* 135.

7. *And a man appealed by a prover after the death of the prover if he be no common thief nor defamed*] *Persons appealed by a prover after his death.* And by parity of reason, he may be bailed, if the approver waive his appeal, or be vanquished. *2 Haw.* 98.

Be let out by sufficient surety] If a justice take insufficient surety, and the party appear not, he is finable by the judge of assize. *H. P.* 97. But if the prisoner appear thereupon, the justice is safe. *2 Haw.* 89.

And if a person who has power to take bail, be so far imposed upon, as to suffer a prisoner to be bailed by insufficient persons, it is said that either he, or any other person who hath power to bail him, may require the party to

find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal, for that insufficient sureties are no sureties. *Id.*

And the person who is to take the bail, may examine them on their oaths concerning their sufficiency. *Id.* 2 *H. H.* 125.

It is to be observed, that the above statute extends only to bail in criminal offences, and therefore gives no power at all to justices of the peace to bail any persons on process in civil actions, or for contempt, to superior courts. 2 *Haw.* 106.

There are furthermore many statutes, which prohibit bail and mainprize in very many cases, and allow the same in many others, which are interspersed among the several titles which treat of those matters.

And where a statute ordaineth, that an offender shall be imprisoned at the king's will or pleasure, there the prisoner cannot be bailed, till he hath redeemed his liberty by such fine or ransom as shall be assessed by the king's justices in his courts. *Dalt. c.* 167.

And those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

Altho' a person be committed to be detained without bail or mainprize, yet if the offence be by law bailable, he that hath power of bailing may bail him. 2 *H. H.* 135.

V. Who may bail, and the manner of it.

By the common law, the sheriff and every constable, being conservators of the peace, might have bailed one suspected of felony; but this authority is transferred from them to the justices of the peace by several statutes. *Lamb.* 15.

By two justices.

And it seems to be a good general rule, that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime: And upon this ground it seems clear that any two justices (1 *Q.*) may of common right bail persons indicted at the sessions, for that any two such justices may hear and determine the indictment. Also it hath been

By one justice.

holden, that any one justice hath the like power; and this seems to be implied by the statute of 1 *R.* 3, *c.* 3. which

which giving one justice power of bailing persons arrested for felony, in like form as if such person had been indicted at the sessions, clearly supposes, that if such persons had been indicted at the sessions, they might have been bailed by any one justice. And if any one justice had such power, before the statute specially relating to the power of justices in granting bail, it seems that he hath still the same power in relation to persons so indicted of any bailable crime under the degree of felony, because the said statutes seem not to restrain him in any such case, under the degree of felony, from any power which he lawfully might claim before. 2 Haw. 103.

But it seems difficult to maintain the power of one justice to bail a person, for any crime before indictment, unless by some statute it be limited to the consuance of one justice, or unless it be an offence directly tending to the breach of the peace, the bailing of persons for which seems properly to come under their consuance as conservators of the peace. 2 Haw. 105.

And Mr. Dalton says, if it is not in case of felony, it seemeth that any one justice alone may bail a prisoner, except where it is otherwise ordered in particular instances by some special statute. *Dalt. c. 12.*

And it seems to be agreed, that any one justice might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances that the party is most likely to live or die; for that every such justice being a principal conservator of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his consuance. 2 Haw. 103.

But by 1 & 2 P. & M. c. 13. *If a person be arrested for manslaughter or felony, or suspicion thereof, being bailable by law, he shall not be let to bail or mainprise by any justices, but in open sessions, except it be by two justices at the least (1 Q), and the same to be present together at the time of the said bailment: Which bail they shall certify in writing subscribed or signed with their own hands, at the next general goal delivery to be holden within the county where the person shall be arrested or suspected.*

Persons arrested for manslaughter, or felony, by two justices.

And the said justices, or one of them, being of the quorum, when any such prisoner is brought before them, for any manslaughter or felony before any bailment, shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as

much thereof as shall be material to prove the felony, shall put in writing before they make the bailment: Which examination, together with the bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission.

And the said justices shall have power to bind all such by recognizance as do declare any thing material to prove the offence, to appear at the next general gaol delivery to give evidence against the party on his trial: And shall certify the same in like manner.

And any justice offending contrary to this act, shall on due proof by examination, be fined by the judges of assize.

But in London, Middlesex, and in other cities and towns corporate, justices may let prisoners to bail, as they might before this act; but when they do bail, they are to take and certify the bail and examination as is here directed.

VI. Requiring excessive bail.

By the declaration of rights 1 W. sess. 2. c. 2. excessive bail ought not to be required.

VII. Denying bail where it ought to be granted.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment. 2 Haw. 90. H. P. 97.

VIII. Granting bail where it ought to be denied.

Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. H. P. 97.

If the keeper of a prison bail any not bailable; he shall lose his fee and office; if another officer, he shall have three years imprisonment, and make fine at the king's pleasure. 3 Ed. 1. c. 15.

M. 18 G. 2. K. and William Clarke, esquire. He as a justice of Surry committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. Str. 1216.

IX. Of

IX. Of bail by writ of habeas corpus.

If bail cannot otherwise be obtained, the law hath provided a remedy in most cases by the *habeas corpus* act 31 C. 2. c. 2. The substance of which is briefly thus :

If the commitment is for treason or felony plainly and specially expressed in the warrant of commitment; also if any person is committed and charged as accessory before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment: in such cases the person shall not be bailed on a writ of habeas corpus; otherwise he may be bailed.

Also if a person is committed for treason or felony specially expressed, yet if he shall in open court the first week of the term, or first day of assizes, petition to be tried, and shall not be indicted some time in the next term or assize after the commitment, he shall upon motion the last day of the term or assize, be bailed, unless it shall appear to the judge upon oath that the king's witnesses could not be produced within that time, and then if he is not tried in the second term or assize, he shall be discharged.

Previous to the aforesaid bailment, the prisoner, or some person on his behalf, shall demand of the officer or keeper, a true copy of the warrant of commitment, which he shall deliver in six hours, on pain of 100 l. to the party grieved for the first offence, and 200 l. and forfeiture of his office for the second.

Then application is to be made in writing, by the prisoner or any person for him, attested and subscribed by two witnesses who were present at the delivery thereof, to the court of chancery, king's bench, common pleas, or exchequer, or if out of term time, to the lord chancellor or one of the judges; and a copy of the warrant of commitment shall be produced before them, or oath made that such copy was denied.

But if any person hath wilfully neglected by the space of two terms to apply for his enlargement, he shall not have a habeas corpus granted in the vacation.

This being done, the lord chancellor, or judges respectively, shall award an habeas corpus under the seal of the court, on pain of 500 l. to be marked in this manner, Per statuta tricesimo primo Caroli secundi regis, and signed by the person that awards the same; and shall be directed to the officer or keeper, returnable immediate.

And the charges of bringing the prisoner shall be ascertained by the judge or court that awarded the writ, and indorped thereon, not exceeding 12 d. a mile.

Then the writ shall be served on the keeper, or left at the gaol with any of the under officers; and the charges so indorsed, shall be paid or tendered to him, and the prisoner shall give bond to pay the charges of carrying him back if he shall be remanded, and that he will not make any escape by the way.

This done the officer shall within three days after service (if it is within twenty miles) return the writ, and bring the body, and shall then likewise certify the true cause of the imprisonment; if above twenty miles and less than an hundred, then within ten days; if above an hundred, then within twenty days; on like pain as before.

But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed.

Then if it shall appear to the said lord chancellor or judges, that the prisoner is detained on a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge or justice of the peace for matters, for which by law he is not bailable; in such case the prisoner shall not be discharged.

If he shall be discharged, he shall thereupon enter into recognizance to appear on his trial; and the writ, and return thereof, and recognizance shall be certified into the court where the trial must be.

But persons charged in debt, or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

*And persons so set at large, shall not be recommitted for the same offence, unless by order of court; on pain of 500*l.* to the party grieved.*

Two things I shall observe upon this statute:

1. That altho' the constable by his own authority, without any warrant of commitment, may carry offenders to gaol, and this was the method of securing prisoners before there were any justices of the peace; yet since the institution of the office of justices of the peace, it is better that they be carried before a justice, to be sent by him to gaol by warrant of commitment; otherwise they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to set forth the cause specially; that is to say, not for treason, or felony in general, but treason for counterfeiting the king's coin, or felony for stealing the goods of such a one to such a value, and the like; that so the court may judge thereupon, whether or no the offence is such, for which a prisoner ought to be admitted to bail.

X. Acknow-

X. Acknowledging bail in another man's name.

By the 21 J. c. 26. *If any person shall acknowledge, or procure to be acknowledged, any bail in the name of any other not privy to the same; he shall be guilty of felony without benefit of clergy.*

In the name of any other] T. 6 G. Two people put in bail in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on this statute. So the court ordered them and the attorney to be set in the pillory, which was done accordingly. Str. 384.

Bail taken before a judge is not within this statute, till it be filed of record. 1 H. H. 696. But it is within the following statute of 4 W. c. 4. by which it is enacted, that any who shall personate another before those who have authority to take bail, so as to make him liable to the payment of any sum of money in that suit or action, shall be guilty of felony (but within clergy.)

Form of bail.

Westmorland. *BE it remembred, that on the — day of — in the — year of the reign of — A. O. of — yeoman, A. B. of — yeoman, and B. B. of — yeoman, came before us John Moore, esquire, and Richard Burn, doctor of laws, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and severally acknowledged themselves to owe to our said lord the king, that is to say, the said A. O. 20 l. and the said A. B. and B. B. 10 l. each, to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition indorsed, [or underwritten.]*

John Moore,
Richard Burn.

The condition of this recognizance is such, that if the within [above] bound A. O. shall personally appear before the justices of our sovereign lord the king assigned to keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace [or, before his majesty's justices of gaol delivery at the next general gaol delivery] to be holden in and for the said county, then and there to answer to our said sovereign lord the king, for and

concerning the felonious taking and stealing of — the property of A. M. of — yeoman, with the suspicion whereof the said A. O. stands charged before us the said justices, and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above [within] written recognizance shall be void.

Or, if the party is in prison, and so absent, Lord Hale says, this is the true form from *Lambard*.

Westmorland. *BE* it remembred, that on the — day of — in the — year of the reign of — before us John Moore, esquire, and Richard Burn, doctor of laws, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the quorum, at Grimeshill in the said county, did come A. B. and B. B. of — in the said county, yeomen, and took in bail until the next gaol delivery to be holden in the said county, one A. O. of — labourer, taken and detained in prison for suspicion of a certain felony in stealing — the property of — and took upon themselves each of the said A. B. and B. B. under the penalty of 20*l.* of good and lawful money of Great Britain, of the goods and chattels, lands and tenements, of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said A. O. shall not personally appear at the said next gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of England. Given under our seals, &c.

But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,
Taken and acknowledged the day and
year abovewritten, before us the
abovesaid

John Moore,
Rt. Burn.

And hereupon a warrant issues for his deliverance, thus:

Westmorland. *JOHN* Moore, esquire, and Richard Burn, doctor of laws, two of the justices of — and one of us of the quorum, To the keeper of his majesty's gaol at — in the said county, greeting. Forasmuch as A. O. of — labourer, hath before us found sufficient sureties to appear

appear before the justices of gaol delivery at the next general gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lord objected against him, and namely, to the felonious taking of — (for the suspicion whereof he was taken, and committed to your said gaol): We command you on the behalf of our said sovereign lord, that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our seals at Orton in the said county, the — day of — in the — year —.

L. Hale says, the advantage of this latter kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause; and may reseize him if they doubt his escape, and have him committed, and so be discharged of the recognizance.

Banks destroying.

EVERY perverse and malicious person, cutting down ^{Powdike.} and breaking up of any part of the dike called *New Powdike* in *Marshland* in the county of *Norfolk*, and the broken dike called *Old field dike* by *Marshland* in the isle of *Ely*, or any other bank being parcel of the rind and uppermost part of the said county of *Marshland*, made for the defence and salvation of the said county of *Marshland*, shall be adjudged felony. And the sessions may determine the same. 22 H. 8. c. 11.

By the 6 G. 2. c. 37. If any person shall unlawfully and maliciously break down or cut down the bank of any river or any sea bank, whereby any lands shall be overflowed or damaged; he shall be guilty of felony without benefit of clergy. s. 5.

Sea and river banks.

And moreover, by the statute of 10 G. 2. c. 32. If any person shall unlawfully cut off, draw up, or remove and carry away any piles, chalk or other materials, driven into the ground, and used for the securing any marsh or sea walls, or banks, in order to prevent the lands lying within the same from being overflowed and damaged; on complaint

Piles for securing banks.

Banks destroying.

complaint or information thereof made upon oath to any justice residing near the place, such justice shall summon the party complained of, or shall issue his warrant to apprehend and bring such person before him, and upon his appearance, or neglect to appear, he shall proceed to examine the fact; and upon due proof thereof made either by confession, or oath of one witness, shall convict the offender; who shall thereupon forfeit 20 l. half to the informer, and half to the overseer for the use of the poor, to be levied by distress and sale: for want of sufficient distress, to be committed to the house of correction, to be kept to hard labour for six months. *s. 5.*

Bankrupt.

Derivation.

LORD Coke says, that *banque* in *French* signifies the same as *mensa* in *Latin*; and that *route* is a sign or mark, as we say a cart rout is the sign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him, that hath wasted his estate, and removed his *banque* so as there is left but a mention thereof. *4 Inst. 277.*

But as the first bankers came to us from *Italy*, it seemeth more probable that they brought their name along with them; and consequently that the word *bankrupt* or *banqueroute* cometh from the Italian *bancq rotto*, the bench being broken. The banker himself was so called from the bench or table which he used, with his name inscribed, and when he failed, his bench was broken. Which word *rotto* is what remaineth in that country of the Latin *rupius*; all which, both word and metaphor, we preserve in our language, when we say that a person is *bankrupt*, or that such a one is broken.

Description of a bankrupt.

The description of a bankrupt, within the several statutes brought together into one view, seemeth to be as follows: *Every person using the trade of merchandize, by way of bargaining, exchange, bartry, chevifance, or otherwise, in gross, or by retail, or seeking his trade of living by buying and selling, or that shall use the trade or profession of a scrivener receiving other mens monies or estates into his trust or custody, who shall (1) depart the realm; or (2) begin to keep his house, or otherwise to absent himself; or (3) take sanctuary; or (4) suffer*

suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes; or (5) shall suffer himself to be outlawed; or (6) yield himself to prison; or (7) willingly or fraudulently shall procure himself to be arrested, or his goods to be attached or sequestered; or (8) depart from his dwelling house; or (9) make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts; or (10) shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament; or (11) shall prefer to any court any petition or bill against any of his creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment than was given at the time of their original contracts; or (12) being arrested for debt, shall lie in prison two months; or (13) being arrested for 100 l. or more, shall escape out of prison,—shall be adjudged a bankrupt; (and in the said cases of arrest, or lying in prison, from the time of his first arrest.) 1 J. c. 15. f. 2. 21 J. c. 19. f. 2. 15. 10 An. c. 15. f. 1.

Every person] An *Irishman*, who trades and hath contracted debts in *England*, and comes over here, may have a commission issued against him, at the petition of the creditors here; and the Irish creditors also upon the commission may come in and prove their debts. And generally, if a person carries on a trade in any place belonging to the crown of *Great Britain*, and comes into *England*; a commission may be taken out by the creditors in *England*. And there have been several instances, where persons belonging to the plantations abroad, and which is their sole place of residence, yet happening to be in *England*; have had commissions of bankruptcy taken out against them here. 1 *Atkins* 82.

A *clergyman*, if he trades, may be a bankrupt; for though by the 21 *H. 8. c. 12.* he is prohibited to trade, and his contracts in that kind are declared to be void, yet they are void with respect to himself only, and he shall not take advantage of the breach of one law, in order to avoid his being subject to another. 1 *Atk.* 199.

An *infant*, though a trader, cannot be a bankrupt; for an infant can owe nothing but for necessities; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due. And no person can be made a bankrupt for

for debts, which he is not liable at law to pay. 2 *Blackf.* 477.

Married women.

The daughter of a freeman of *London*, being a *married woman*, if she trades separately from her husband, may be a bankrupt. 1 *Atk.* 206.

Using the trade of merchandize,

Using the trade of merchandize] As by exercising the calling of a merchant, a grocer, mercer, or in one general word a *chapman*, who is one that buys and sells any thing. 2 *Blackf.* 477.

But one single act of buying and selling will not make a man a trader; but there must be a repeated practice, and profit by it. 2 *Blackf.* 476.

Of merchandize] But no person who shall adventure any money in the *East India* company, and shall receive his dividend in merchandize, and shall sell or exchange the same, shall be judged thereby a merchant or trader within any statute for bankrupts. 13 & 14 *C. 2. c. 24. s. 3, 4.*

And generally, buying and selling stock in the public funds, or government securities, will not make a man a bankrupt; the same not being goods, wares or merchandize, within the intent of the statute, by which a profit may be fairly made. 2 *Blackf.* 476.

So also the members of the corporation of the English *linen company* (for making cambricks and lawns), shall not upon that account only be liable to bankruptcy. 4 *G. 3. c. 37.*

or buying and selling.

Seeking his trade of living by buying and selling] He that buys only, or sells only, is not within this description; but it must be both buying and selling, and also getting a livelihood by it. 2 *Blackf.* 476.

Farmers, graziers, or drovers.

Also, by special statute, 5 *G. 2. c. 30.* No *farmer, grazier, or drover* of cattle, shall be deemed a bankrupt. *s. 40.*—But if such farmer or other shall deal in wool, hops, or the like, he shall be deemed a bankrupt; otherwise any person by taking a farm, might avoid the statutes. And in the case of *Majo and Archer, E. 8 G.* a farmer who planted potatoes, but withal bought divers large quantities of potatoes, and sold the same again, was adjudged a bankrupt. *Str.* 513.

And if a person rent a brick ground, and makes bricks thereon, for publick sale, he is subject to the bankrupt laws. *Dunf. and East, 1 V. 34.*

But if a person exercise a manufacture from the produce of his own land, as a necessary or useful mode of enjoying that produce, he shall not be considered as a trader; though he buy necessary ingredients to fit it for the market. But where

where the produce of the land is merely the raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land; there he is a trader. *Id.*

And in the case of *Bartholomew* and another, assignees of *Davis*, a bankrupt, v. *Sherwood*. *M.* 27 *G.* 3. This was a case tried before *Eyre*, B. at *Oxford* assizes, 1786. The only question was, whether *Davis* was a trader within the meaning of the bankrupt laws. It was contended that he was a dealer in horses; as to which it appeared in evidence, that *Davis*, at this time, and for a few years past, had rented a considerable farm at *Whitechurch*; and that he kept two, and occasionally three teams of horses for the farming business. That previous to his taking this farm, he had lived with an uncle, during which time he attended different fairs, and occasionally bought and sold horses: that after he took this farm, there were several instances of his attending fairs, and of every now and then buying a horse, which was not calculated for the farming business, and which he constantly sold again. It appeared, that during the course of two years he had bought and sold five or six horses in this manner; two of which had been sold directly after he had bought them for the sake of a guinea profit, and another was sold again within three days. No evidence being offered to contradict this, the judge left it to the jury on this evidence, who found a verdict for the plaintiff. A motion was made for a new trial, which, after argument, was refused.—And *Asbburst*, J. said, it is admitted on the part of the defendant, that this was a matter of evidence, and proper for the consideration of the jury; then if it were proper to be left to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer, in the course of his business, buy a horse, and after using him for some time, sell him again, that will not subject him to the bankrupt laws. But in this case, the evidence is, that he bought horses for the express purpose of gaining by it. —*Buller*, J. It appears upon the evidence, that there were many instances of the bankrupt's buying horses which he could not use in his farming business, and others for the express purpose of selling again. Whether there were more or fewer instances, was proper to be left to the consideration of the jury. It is like the case of a vintner, who, if he sell only a few dozen of liquor to particular friends, cannot be made a bankrupt; but if he is desirous to sell to every person who applies, that will subject him to the

bankrupt laws. But in all these cases, the question is, whether the person buys and sells with a view to make a profit by it; and that is proper to be left to the consideration of the jury. Here it was left to them; and they have found, that *Davis* was a trader. *Durnfs and East*, 1 V. 573.

Handicrafts.

Also, no *handicraft* occupation, where nothing is bought and sold, will make a man a bankrupt; as that of a husbandman, a gardner, and the like, who are paid for their work and labour. 2 *Blackst.* 476.

Innkeepers of victuallers.

Also, an *innkeeper* or *victualler* cannot, as such, be a bankrupt; for his gain or livelihood doth not arise from buying and selling in the way of merchandize, but greatly from the use of his house, furniture, attendance, and the like; and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding house and makes considerable gains by buying and selling what he spends in the house, and such an one is clearly not within the statute. 2 *Blackst.* 476. *Burr. Mansf.* 2064.

In the case of *Patmas v. Vaughan*, H. 27 G. 3, it was determined, that an innkeeper who sells liquor out of his house to all customers that apply for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealings and the profits arising from it may be. *Durnf. and East*, 1 V. 572. (a)

Shoemakers, smiths, and bakers, &c.

But where persons buy goods and make them up into saleable commodities, as *shoemakers*, *smiths*, *bakers*, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts: for the labour is only in melioration of the commodity, and rendering it more fit for sale. 2 *Blackst.* 476.

Butchers.

So also, for the like reason, a *butcher* is within the statutes of bankruptcy. *Burr. Mansf.* 2148.

But where a person bought a *coal mine*, and worked the mine, and sold the coals, he was adjudged not to be within the statutes for bankrupts: But otherwise it would have been, if he had bought the coals and sold the same again. 2 *Willf.* 169.

Scriveners.

Or that shall use the trade or profession of a *scrivener*, receiving other mens monies or estates into his trust or custody] Bankers, brokers, and factors are within this description. 5 G. 2. c. 30. s. 39.

(a) See also the above case of *Bartholomew v. Sherwood*.

So also pawnbrokers, as it seemeth; being comprehended ^{Pawnbrokers.} under the general word *brokers*, which includes the several species of brokerage. 1 *Atk.* 206.

But no *receiver-general* of any taxes granted by act of ^{Receiver-gene-} parliament, shall be deemed a bankrupt. 5 *G. 2. c. 30.* ^{rah.} *f. 40.*

Begin to keep his house, or otherwise to absent himself ^{Person keeping} If a man keeps his house for a long time, this doth ^{his house.} not immediately make him a bankrupt; but if he conceals himself within his house for a day or hour, to delay or defraud his creditors, he is a bankrupt. 1 *Bac. Abr.* 250.

Obtain any protection, other than such person as shall be lawfully protected by privilege of parliament ^{Obtaining pro-} By the 4 *G. 3. c. 33.* in respect to persons having privilege of parliament, ^{tection other} it is enacted, that the petitioners, on affidavit in any of his majesty's courts of record at *Westminster*, that the debt is justly due, and that they verily believe that the debtor is a merchant, banker, broker, factor, scrivener, or trader, within the statutes of bankruptcy, may sue out a summons, or an original bill and summons, against such person, and serve him with a copy thereof; and if he shall not, within two months after personal service of such summons, pay, secure, or compound for such debt, or enter into a bond in such sum and with two such sureties as any of the judges of that court out of which the summons issued shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, he shall be adjudged a bankrupt from the time of the service of such summons, and the creditors may proceed against him as against other bankrupts. Provided, that this shall not extend to any debt contracted before *March* the 8th, 1764. And provided also, that nothing herein shall subject any person intitled to privilege of parliament to be arrested or imprisoned during the time of such privilege, except in cases made felony by any of the statutes of bankruptcy.

But notwithstanding that a person may have committed any of the abovesaid acts of bankruptcy, yet nevertheless ^{For what debts} no commission of bankrupt shall be issued on the petition of ^{a commission} one or more creditors, unless the single debt of such creditor, or ^{shall be issued,} of two or more, being partners, amounts to 100l.; or of two ^{and what is to} such creditors petitioning amounts to 150l.; or of three or more ^{be done pre-} to 200l. 5 *G. 2. c. 30. f. 23.* ^{vious thereto.}

And the creditor or creditors petitioning, shall, before the commission shall be granted, make affidavit before a **magist**

Bankrupt.

matter in chancery (to be filed with the proper officer) of the truth of the debt, and shall also give 200*l.* bond to the lord chancellor for proving the debt as well before the commissioners, as upon a trial at law, if the due issuing of the commission shall be contested, and also for proving the party a bankrupt, and farther to proceed on such commission as hereafter is mentioned: and if it shall appear, that the commission was taken out fraudulently, the lord chancellor may order satisfaction, and may assign such bond to the party injured. *Id.*

Issuing the commission.

But these circumstances abovementioned being observed, then the lord chancellor may on such complaint in writing as aforesaid, by commission under the great seal, appoint such wise and honest discreet persons as to him shall seem good, to be commissioners, 13 *El. c. 7. f. 2.*

Commissioners' oath.

Which commissioners, before they act, shall administer to each other the following oath: *I A. B. do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me as a commissioner in a commission of bankrupt against ——— and that without favour or affection, prejudice or malice. So help me God. 5 G. 2. c. 30. f. 43.*

And they shall keep a memorial thereof signed by them, amongst the proceedings. *Id. f. 44.*

Notice in the gazette of the commission being issued.

Then the commissioners shall cause notice of the commission being issued to be given in the gazette, and likewise notice in writing to be left at the bankrupt's usual place of abode, or personal notice to be given if he is in prison. *Id. f. 1.*

Bankrupt to surrender.

In which notice also shall be appointed a time and place of meeting of the commissioners; which meeting shall be at three several times within forty-two days, the last of which shall be on the forty-second day; within which time the bankrupt shall surrender himself, and discover his estate and effects. *Id. f. 1, 2.*

But the lord chancellor may enlarge the time for such surrender and discovery, not exceeding fifty days from the end of the said forty-two days; so as such order be made by him, six days before the expiration of the forty-two. *Id. f. 3.*

Creditors to come in.

A creditor may chuse whether he will come in under the commission or not: But if he chuses to come in, he cannot proceed at law likewise for the same debt. Therefore if a creditor has the bankrupt in execution, he must discharge him from the execution, before he can be admitted

admitted as a creditor under the commission. And a petitioning creditor, by the very petition, hath made his election. 1 *Mk.* 83. 152.

The first meeting shall be for chusing an assignee or assignees of the bankrupt's estate and effects (which in *London* shall be at *Guildhall*). 5 *G. 2. c. 30. f. 26.*

Chusing assignees.

But before assignees are chosen, the major part in value of the creditors may direct how and with whom the money to be received shall remain till divided: to which the assignees shall conform, as often as 100*l.* shall be got in. *Id. f. 32.*

The money with whom to be lodged.

And the creditor or creditors, who shall sue out the commission, shall prosecute the same at their own expence till assignees be chosen; and the commissioners shall at the meeting for chusing assignees ascertain such costs, and by writing under their hands order the assignees to reimburse the same, out of the first effects that shall be got in. *Id. f. 25.*

Expences of the commission.

At the said meeting for chusing assignees, the commissioners shall admit the proof of any creditor's debt, that lives remote from the place of meeting, by affidavit; and also permit any person duly authorized by letter of attorney from such creditors (oath being first made of the due execution thereof, either by affidavit sworn before a master in chancery, or before the commissioners *viva voce*; and in case of creditors residing in foreign parts, such affidavits to be made before a magistrate where the party shall be residing, and together with such creditors letters of attorney, to be attested by a notary publick) to vote in the choice of an assignee or assignees in the place of such creditor: And every creditor shall be admitted to prove his debt, without paying any thing for the same. And the commissioners shall assign the estate and effects unto such person or persons as the major part in value of the creditors, according to the debts then proved, shall chuse. *Id. f. 25, 26.*

Who shall vote for assignees.

But no creditor shall so vote, whose debt shall not amount to 10*l.* *Id. f. 27.*

And the commissioners may from time to time appoint new assignees, if the major part of the creditors, whose debts amount to 10*l.* shall think fit; and the former assignees shall assign to them in ten days after notice of such choice, and of the new assignees acceptance thereof, signified under their hands; on pain of 200*l.* to the creditors, with full costs. *Id. f. 30.*

Chusing new assignees.

And the lord chancellor, on petition of any creditors, may order former assignments to be vacated, and new assignments

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signments to be made of the effects not received ; and the commissioners shall cause notice thereof to be given in the two next gazettes, and that the debtors do not pay to the assignees removed. *Id.* f. 31.

And the new assignees, on filing a supplemental bill, shall be entitled to the benefit of the proceedings in a suit begun in the time of the first assignees ; for there is no privity between the bankrupt and the assignees, or at most but an artificial one ; and it would be hard, where there have been pleadings, examinations, and the like, in a former suit, that the new assignees should not have the benefit thereof, but should be obliged to begin again. *1 Att. 88.*

Bankrupt not
surrendering, to
be apprehended.

On certificate under the hands and seals of the commissioners, that such commission is issued, and such person proved before them to become bankrupt, any judge or justice of the peace shall, on application to them for that purpose made, grant their warrant (A) for the taking and apprehending such person, and commit (B) him to the common gaol, there to remain until he be removed by order of the commissioners by their warrant. And the gaoler shall forthwith give notice to one or more of the commissioners, of such person being in his custody ; whereupon they shall send their warrant to him to deliver him to the person who shall be named in the warrant, who shall convey him to the commissioners to be examined. And the commissioners by such or any other their warrant, may seize the goods and papers of such bankrupt which shall be in any prison (necessary wearing apparel of himself and wife and children excepted). *5 G. 2. c. 30. f. 14.*

But if the person so apprehended shall, within the time allowed, submit to be examined, and in all things conform, he shall have the same benefit as if he had surrendered. *Id.* f. 15.

By which last clause it seemeth, that the bankrupt shall not be apprehended and committed, until he shall have made default, in not surrendering and making discovery, after due notice as aforesaid.

Bankrupt to de-
liver up.

The bankrupt, after assignees shall be appointed, shall deliver up to them on oath (to be administered by a master in chancery, or justice of the peace) all his books of account, papers, and writings not seized by the messenger of the commission, and not before delivered up, and then in his power, and discover such as are in the power of others ; and being not in custody, shall at all

times attend the assignees, on reasonable notice given to him in writing, or left for him at his place of abode, in order to assist in making out the account of his estate.

5 G. 2. c. 30. f. 4.

And such bankrupt having surrendered, shall at all reasonable times, before the expiration of forty-two days, or further term, be at liberty to inspect his papers, in presence of the assignees, or some person appointed by them, and to bring with him for his assistance any persons not exceeding two at a time, and to make extracts from thence, the better to enable him to discover his effects.

Bankrupt to be at liberty to inspect his papers.

Id. f. 5.

And in order thereto, he shall be free from arrest or imprisonment of his creditors, in coming to surrender, and from his surrender, for the said forty-two days or further term; provided he was not in custody at the time of surrender. And if he be arrested for debt, or on an escape warrant, coming to surrender, or after surrender within the said term; then, on producing the notice under the hands of the commissioners or assignees, to the officer who shall arrest him, and making it appear to such officer that such notice is signed by them, and giving the officer a copy thereof, he shall be immediately discharged: And if any officer shall in such case detain him, he shall forfeit to him for his own use 5l. a day, by action of debt, with full costs. *Id.*

Shall be freed from arrest.

And if the bankrupt be in prison or custody at the time of issuing the commission, and is willing to surrender and be examined, and can be brought before the commissioners and creditors, the expence thereof shall be paid out of his estate: But if he is in execution, or cannot be brought before the commissioners, then they shall attend him in prison, and the assignees may appoint a person to attend him in prison, and to produce him his books and papers, in order to prepare his last discovery and examination; a copy whereof the assignees shall apply for, and the bankrupt shall deliver to them, ten days before such last examination. *Id.* f. 6.

Bankrupt in prison when the commission is issued.

And the commissioners may examine him (on oath, 21 f. c. 19. f. 9.) as well by word of mouth, as on interrogatories in writing, touching his trade, dealings, estate, and effects; and take down in writing his answer to verbal examinations; which he shall sign: And if he shall refuse to answer, or not answer fully all lawful questions, or refuse to sign the same; the commissioners may by warrant commit him to prison without bail, till he shall

Bankrupt to be examined.

submit to them, and full answer make, and sign the same; which warrant shall specify such questions. Id. f. 16, 17.

As well by word of mouth, as on interrogatories in writing] M. 4 G. 2. K. and Solomon Nathan. The defendant was committed by the commissioners, who in their warrant recite, that he had been examined before them upon his oath, upon which examination he had notoriously prevaricated; they therefore commit him without bail or mainprize, until he shall make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due course of law. Upon a *habeas corpus* it was moved, that the defendant might be discharged. One reason whereof was because the statute requires, that there shall be interrogatories exhibited for his examination, that so he may have time to consider of his answer, and it can then appear to the court, whether he is bound to answer: perhaps this prevarication might be in a matter they had no power to inquire into. And by the court; Interrogatories are a term known in law, and import that the questions are put in writing. And they said that *Holt Ch. J.* held, that the bankrupt ought to have a copy and time to consider of his answer. *Str. 880.*

Or not answer fully] In the aforesaid case of K. and Solomon Nathan, another objection against the commitment was, that they commit him, because upon his examination he had *notoriously prevaricated*; this being too loose an expression, for he might prevaricate, and yet give a full answer at last. And by the court; Where these special authorities are given, the words of the act ought to be pursued. *Id.*

The commissioners may by warrant commit him] H. 1 G. 3. K. and Perrot. The defendant being brought up by *habeas corpus*, appeared upon the return to have been committed, "until such time as he shall submit himself to the said commissioners or the major part of them, and full answer make to their satisfaction, to the question so put by them to him as aforesaid." Which question was specified in the warrant to have been, that since he did admit there was a deficiency of 13,513*l.* he should give a true and particular account what was become of it, and how he had disposed thereof. His answer was, that on goods sold the last year he had lost upwards of 2,000*l.*; that by mournings he had lost upwards of 1000*l.*; and that for 9 or 10 years (he was sorry to say it) he had been

been extremely extravagant, and spent large sums of money. Which answer not being satisfactory to the commissioners, they committed him as aforesaid. And now the court, judging the answer to be very insufficient and unsatisfactory, ordered him to be remanded. Afterwards, he was brought up again, and it appeared that he had given a further answer, and particularized a woman upon whom he had spent 5,000*l.* from Dec. 1758 to Dec. 1759, and particularized the times of sending and giving it to her; but that no other person was privy to this, and that the woman (whose name was *Sarah Powell*, otherwise *Taylor*) is dead, as he has heard: with several other improbable circumstances. It was urged, that now having given a full answer, he ought to be discharged; that it is not material, in the present respect, whether his answer be true or false, or whether his conduct was prudent or imprudent; and if he be not now discharged, he must be imprisoned for life. But the court still held the answer to be incomplete and unsatisfactory, and again ordered him to be remanded. [And this man was afterwards convicted and executed, for concealing his effects.] *Burr. Mansf.* 1122, 1215.

Till he shall submit to them, and full answer make] In the aforesaid case of *Solomon Natban*, the commitment was, *until he shall make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due course of law.* And by the court; This commitment not pursuing the words of the statute, the prisoner must be discharged. *Str.* 880.

M. 8 W. Bracy's case. A commitment *until he should conform himself to their authority*, was adjudged ill, because too general; since they have authority in other matters besides that: and it is best, in the like cases, strictly to pursue the statute. *L. Raym.* 100.

Another commitment *till discharged by due course of law*, adjudged ill for the same reason. *Id.* 851.

But if on an *habeas corpus* there appear insufficiency in the warrant of commitment, the judge nevertheless shall commit him to the same prison, to remain as aforesaid, unless it be made appear that he hath fully answered all lawful questions, or unless it appear that he had sufficient reason for not signing. 5 *G. 2. c. 30. s. 18.*

And if the gaoler shall suffer him to escape, or to go without the walls or doors of the prison; he shall, on conviction

conviction, by indictment or information, forfeit 500 l. to the creditors. *Id.*

Also, the gaoler shall, on request of any creditor who shall have proved his debt, and producing a certificate thereof under the hands of the commissioners, produce and shew him to such creditor; on pain of 100 l. to the creditors, by action of debt. *Id.* f. 19.

Bankrupt not
surrendering and
conforming, fe-
lony.

And by the said statute it is enacted, that if he shall not within the said time surrender himself to the commissioners, and sign such surrender, and also submit to be examined from time to time on oath, and in all things conform to the statutes concerning bankrupts, and also on his examination fully discover all his estate, and how disposed of, except what hath been *bona fide* disposed of in the way of his trade and dealings, and except what hath been laid out in the ordinary expence of his family, and also deliver up to them all his effects (except the necessary wearing apparel of himself, and wife and children): then in case of any default and wilful omission in not surrendering and submitting to be examined, or in case he shall remove, conceal, or embezzle any part of his estate to the value of 20 l. or any books of account, or writings relating thereto, with intent to defraud his creditors, and be thereof convicted by judgment or information, he shall be guilty of felony without benefit of clergy, and his estate shall be divided among his creditors. *Id.* f. 1.

Other persons
concealing the
bankrupt's ef-
fects.

And every person who shall accept any trust, or conceal any estate of the bankrupt, and shall not in forty-two days after issuing the commission, and notice thereof in the gazette, discover the same in writing to one or more commissioners or assignees, and submit himself to be examined; shall forfeit to the creditors 100 l. and double value of the estate concealed, by action of debt with full costs. *Id.* f. 21.

Bankrupt's wife
may be examin-
ed.

Also the commissioners may examine on oath the bankrupt's wife, like as other persons. 21 f. c. 19. f. 5, 6.

And every other
person.

As also they may examine in like manner every other person duly summoned before, or present at their meeting, touching the person, trade, dealings, estate, and effects of the bankrupt, and any acts of bankruptcy by him committed; and may take down in writing the answers to verbal examinations, which the party shall sign: And if any of them shall refuse to answer, or not answer fully all lawful questions, or refuse to sign the same, the commissioners

commissioners may by warrant commit him to prison without bail, till he shall submit to them, and full answer make, and sign the same; in like manner as is said before in section the 19th concerning the bankrupt himself. 5 G. 2. c. 30. f. 16, 17, 18, 19.

The said commissioners shall have power by their discretions to take such order with the lands of such bankrupt; as well copy or customary hold as freehold, which he had in his own right before he became a bankrupt; or which he purchased jointly with his wife or child to the only use of such bankrupt, or for such use or interest as he may lawfully part with; or with any person of trust to any secret use of such bankrupt; and also with all his money, goods, chattels, wares, merchandizes, and debts; and cause all the same to be searched and appraised to the best value they may; and the same to be sold by deed indented, and inrolled in a court of record; or otherwise ordered for payment of the creditors. 13 El. c. 7. f. 2.

Bankrupt's estate to be disposed of by sale or otherwise

And if any lands or goods shall descend or come to the bankrupt afterwards, before the debts be fully paid; the same shall be disposed of in like manner. *Id.* f. 11.

Bankrupt's future estate.

But this shall not extend to lands assured by such person before he becomes bankrupt, provided the assurance be made *bona fide*, and not to his own use only, or of his heirs; and that the party to whose use they are assured, be not privy to the fraudulent purpose of the bankrupt to deceive his creditors. *Id.* f. 12.

Lands sold bona fide.

Also the commissioners may by deed indented, and inrolled at *Westminster* in six months, sell the bankrupt's estate in tail, whereof no reversion or remainder is in the king or of the king's gift; which sale shall be good against all persons, whom the bankrupt by common recovery, or otherwise, might cut off. 21 J. c. 19. f. 12.

Estate tail.

Also, if the bankrupt hath conveyed any estate, on condition, or power of redemption, at a day to come, by payment of money, or otherwise; the commissioners before the time of the performance of such condition may appoint under their hands and seals any person to make tender or payment of money, or other performance, as fully as the bankrupt might have done; and may dispose of the estate redeemed for the use of the creditors, as fully as any other estate of the bankrupt. *Id.* f. 13.

Estate mortgaged.

Persons purchasing copyhold or customary lands shall pay a fine to the lord of the manor, who shall hereupon admit them. 13 El. c. 7. f. 4.

Customary lands.

Bankrupt.

In order to save the expence of two fines, it was recommended by the lord chancellor *Hardwicke* in such case, to leave out the copyhold estate in the assignment; and then the commissioners, when they can meet with a purchaser, may convey to him in the first instance. 1 *Atk.* 96.

Effects which he hath as executor.

Effects which a bankrupt hath as executor only shall not be applied to the use of the creditors; but shall go according to the direction of the testator. 1 *Atk.* 101.

Commissioners may break open doors.

Commissioners and others by warrant under their hands and seals, may break open the bankrupt's houses, doors, trunks, and chests, where he or any of his goods shall be reputed to be, and seize upon and order his body and goods as before is said. 21 *J. c.* 19. *f.* 8.

Bankrupt fraudulently conveying.

If the bankrupt shall convey to any of his children, or other person, any lands or goods, or transfer his debts in other men's names, except the same be conveyed or transferred on marriage of any of his children, or for some valuable consideration; the same may be disposed of in like manner. 1 *J. c.* 15. *f.* 5.

And if the bankrupt shall on his examination be found fraudulently to have conveyed his lands, goods, or estate; to the value of 20 l. to defraud his creditors, and shall not discover the same, and (if it lie in his power) deliver the same to the commissioners: or if he cannot make it appear to the commissioners, that he hath sustained some casual loss whereby he is disabled to pay what he oweth; he shall, on conviction upon indictment at the assizes or sessions, be set in the pillory in some public place for two hours, and have one of his ears nailed to the pillory, and cut off. 21 *J. c.* 19. *f.* 7.

Bankrupt compounding with the person suing out the commission.

And if any bankrupt, after issuing the commission, shall compound with the person suing out the same, for more than his proportion with the rest of the creditors; such commission may be superseded, and the lord chancellor may award to any creditor petitioning another commission, and the person so compounding shall lose his whole debt, and deliver up to the new commissioners all he shall have so received for the use of the other creditors. 5 *G. 2. c.* 30. *f.* 24.

Debtor paying to a bankrupt.

If a debtor to a bankrupt pays him voluntarily, he must pay it over again, but it is otherwise if he pays him by compulsion of law. *Read. Bankr.*

Money received of a bankrupt.

But no real creditor of the bankrupt shall be liable to refund to the assignees, any money which before the suing forth the commission was in course of trade received by

by him of the bankrupt before he had knowledge of the person's becoming a bankrupt, or being insolvent. 19 G. 2.

c. 19. f. 1.

And no purchaser for valuable consideration shall be impeached, unless the commission be sued out in five years after the person shall become a bankrupt. 21 f.

Purchaser not to be impeached after five years.

c. 19. f. 14.

If the bankrupt, at the time he shall become bankrupt, shall, by consent of the true owner, have in his possession and disposition any goods whereof he shall be reputed owner, and take upon him the sale or disposition thereof as owner; the commissioners may dispose of the same, as fully as any other part of the bankrupt's estate.

Bankrupts conveying their goods, and keeping possession.

Id. f. 11.

If any estate of the bankrupt be extended after he is become a bankrupt, by any person under pretence of his being an accountant or indebted to the king; the commissioners may examine upon oath, whether the said debt were due to such debtor or accountant, upon any contract originally made between such accountant and the bankrupt; and if it was made with any other person than the said accountant, or for the use of any other person, the commissioners proceedings shall be available against the said extent. *Id.* f. 10.

Debt due to the king.

Otherwise, an extent of the crown is available against a commission of bankruptcy; the crown not being within the statutes of bankrupts. 1 *Stat.* 262.

The commissioners or assignees may state accounts between the bankrupt and his debtors or creditors, and set one debt against another, and the balance only shall be paid on either side. 5 G. 2. c. 30. f. 28.

Commissioners may state accounts.

Also the assignees, with consent of the major part in value of the creditors present at a meeting pursuant to notice to be given in the gazette, may submit disputes relating to the bankrupt's estate to arbitration; and may compound for debts owing to the bankrupt. *Id.* f. 34,

May refer to arbitration and compound.

35.

Creditors of a joint estate, where there are no separate creditors, may exhaust both the joint and separate estate; but where there are both joint and separate creditors, the joint creditors (as they give credit to the joint estate) shall have first their demand on the joint estate, and the separate creditors (as they give credit to the separate estate) shall have first their demand on the separate estate: But if there be a surplus of the separate estate, the joint creditors are intitled to it; for a bankrupt has no right to any thing, till they

Joint creditor.

Bankrupt.

they are fully satisfied. But for the saving of expences, where there is a joint commission depending, it seemeth best for the separate creditors not to take out a separate commission, but to apply to the court for an order to be admitted to come in and prove their debts under the joint commission. 1 *Atk.* 67, 138, 227.

Reward for discovering.

Every person who shall, after the time of surrender, voluntarily make discovery to the commissioners or assignees, of any part of the bankrupt's estate, not before come to the knowledge of the assignees, shall have 5*l.* per cent. and such farther reward as the assignees and the major part of the creditors in value, present at any meeting, shall think fit. 5 *G. 2. c.* 30. *f.* 20.

Persons having security, to have only their share.

Creditors having security by judgment, statute, recognition, specialty with penalty or without, or other security, or having no security, or having made attachments in *London* or elsewhere by any custom of the goods of such bankrupt, whereof there is no execution or extent served and executed upon the lands, goods, or estate of such bankrupt before he shall become bankrupt, shall not be relieved for more than a rateable part with the other creditors, notwithstanding any penalty or greater sum contained in such security. 21 *J. c.* 19. *f.* 9.

Securities for money not become due.

Persons taking securities, payable at a future day, for goods delivered to persons who shall become bankrupts before the time of payment, shall be admitted to prove their securities, and receive their proportion, deducting interest from the time of payment to the time it would have become due. 7 *G. c.* 31. *f.* 1, 2.

But where the payment depends upon a future contingency, as if a security be made to pay to the wife so much in case she survives her husband, here she cannot come in amongst the creditors, because it is entirely uncertain whether she shall ever have any demand or not. And in case of the event happening afterwards, she can only come upon the bankrupt's future estate. 1 *Barnard.* 59.

Bottom-ree insurance.

The obligee in any bottom-ree, or respondentia bond, and the assured in a policy of insurance, shall be admitted to claim; and after the loss or contingency, to prove the debt thereon, in like manner as if the same had happened before issuing the commission. 19 *G. 2. c.* 32. *f.* 2.

Mortgagee.

The mortgagee may chuse whether he will come in as a creditor. *Read Bankr.*

Landlord for his rent.

A landlord may distrain for his rent upon a bankrupt's goods, either before or after the assignment; but if he neglects to do it, and suffers them to be removed, he can only

only come in upon an average with the rest of the creditors. But if the goods remain on the premises, he may distrain them, even after the messenger is in possession, or after sale by the assignees. And he is not restricted to one year only, as in the case of executions, but may distrain for his whole arrear. 1 *Atk.* 102, 3.

An apprentice, for money to be refunded given with him on his binding, shall come in only amongst the rest of the creditors *pro rata*. 1 *Atk.* 149.

Apprentice.

Where debts carry interest, the same shall be continued down to the date of the commission: but note-creditors have no right to prove interest upon them, unless it is expressed in the body of the notes. Even at law, where notes are for value received, and interest is not expressed, the jury do not give the plaintiff, in an action upon the notes, interest for them, but by way of damages only: and commissioners of bankrupts cannot award damages. 1 *Atk.* 151, 259.

Interest how to be computed.

Assignees shall not be answerable for losses occasioned by their own necessary acts; but if an assignee trusts a person with the payment of money, who fails, and the money is lost, such assignee shall be answerable over to the creditors, unless he consulted the body of the creditors in the appointment of such agent. 1 *Atk.* 87.

Assignees how far answerable for losses.

An assignee, who is an officer of the court, and an officer of the commission, shall not be allowed to stop a person's share in the dividend, on account of his own private debt, which is owing to him from that person: he hath his remedy at law, and ought not to intermix his own private affairs with the commission, to which he is only a trustee. 1 *Atk.* 90.

Assignee cannot retain for money due to himself.

If any person shall swear that any sum is due to him from the bankrupt, which is not due, or more than is due; he shall suffer as in cases of perjury, and moreover forfeit double to the creditors. 5 *G. 2. c. 30. s. 29.*

Swearing to a false debt.

The assignees shall keep books of account of all sums and effects received; which every creditor who hath proved his debt may inspect at all seasonable times. *Id. s. 26.*

Assignees to keep books.

The assignees shall, after four months, and within twelve months after issuing the commission, cause at least twenty-one days notice to be given in the gazette, of the time and place the commissioners and assignees intend to meet to make a dividend; at which time, the creditors who have not before proved their debts may prove them: and the assignees shall produce fair accounts, and be sworn to them before the commissioners, if required by the creditors; and

First dividend.

Bankrupt.

and they shall be allowed therein all reasonable expenses. And the commissioners may then order, under their hands, a distribution (to every creditor a portion ratelike, according to the quantity of his debts, 13 *El. c. 7. f. 2.*) ; which order shall contain the time and place of making it, and the total of the debts proved, and of the money in the hands of the assignees, and how much in the pound shall be then distributed ; one part of which order shall be filed among the proceedings under the commission, and each of the assignees shall have a duplicate thereof. And the assignees shall take receipts for the same, in a book to be kept for that purpose. 5 *G. 2. c. 30. f. 33.*

Allowance to
the bankrupt.

The bankrupt surrendering and conforming, shall be allowed 5*l. per cent.* if after such allowance the neat produce of his estate will pay 10*s.* in the pound ; so as the said 5*l. per cent.* amount not to above 200*l.*

And if the neat produce will pay 12*s. 6d.* in the pound, he shall be allowed 7*l. 10s. per cent.* so as it amount not to above 250*l.*

And if it will pay 15*s.* in the pound, he shall be allowed 10*l. per cent.* so as it exceed not above 300*l.*

If the neat produce will not pay 10*s.* in the pound, the bankrupt shall be allowed so much as the assignees and commissioners shall think fit, not exceeding 3*l. per cent.* 5 *G. 2. c. 30. f. 7, 8.*

But the same shall not be paid to the bankrupt, till a final dividend shall be made ; because until that time, creditors may still come in to prove their debts. 1 *Att. 208.*

Certificate and
allowance there-
of.

But no discovery on oath shall intitle the bankrupt to the said allowance, unless the commissioners shall, under their hands and seals, certify to the lord chancellor, that he hath made a full discovery of his estate, and in all things conformed himself ; and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery ; and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20*l.* and who have proved their debts, or some person by them authorised thereto, shall sign such certificate, and testify their consent to such allowance and certificate, and to the bankrupt's discharge, to be also certified by the commissioners ; but the commissioners shall not certify the same, till they have proof by affidavit of such creditors, or of the person by them respectively authorised, signing the said certificate, and of the power by which any person is so authorised (and the letter of attorney of a creditor residing in foreign parts,

parts, attested by a notary public, shall be sufficient evidence in such case of such power, 24 G. 2. c. 57. f. 10.) which said affidavit, together with such power to sign, shall be laid before the lord chancellor with the certificate in order for allowing the same;—and unless the bankrupt make oath, that the certificate and consent of the creditors were obtained fairly and without fraud; and unless the certificate shall, after such oath, be allowed and confirmed by the lord chancellor, or two of the judges to whom he shall refer it: and any of the creditors shall be allowed to be heard against making the certificate, and against the confirmation of it: nor shall any commissioner sign the certificate, till after four parts in five in number and value of the creditors shall have signed it. 5 G. 2. c. 30. f. 10.

And every security given to the use of any creditor, to induce him to sign such allowance or certificate, shall be void. *Id.* f. 11.

Moreover, no bankrupt shall be intitled to such allowance, who hath upon marriage of any child given above 100l., unless he prove by his books, or upon his oath, that he had remaining at the time sufficient to pay his debts; or who hath lost in one day the value of 5l. or in the whole the value of 100l. in twelve months next before his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, shovelboard, cockfighting, horse-races, dog-matches, foot-races, or other pastime or game, or in bearing a part in the stakes, or by betting; or hath within one year before he became a bankrupt lost 100l. by contracts for the stock of any company, or publick funds, where the contract was not to be performed within a week, or where the stock was not actually transferred. *Id.* f. 12.

And moreover, by 24 G. 2. c. 57. When any person shall fraudulently swear, before the major part of the commissioners, or by affidavit exhibited to them, that a sum of money is due to him from the bankrupt, which shall in fact not be really owing; and shall in respect of such fictitious debt, sign the certificate for such bankrupt's discharge; in such case, unless the bankrupt shall, before the major part of the commissioners have signed the certificate, by writing signed by him and delivered to one or more of the commissioners or assignees, disclose the fraud, and object to the reality of such debt, the certificate shall be void, and the bankrupt shall not be intitled to his discharge or allowance. *Id.* f. 9.

By 14 G. 3. c. 77. f. 59. and 16 G. 3. c. 38. f. 69. Bankrupts who have conformed to all the laws relating to
10 them,

them, but who cannot obtain their discharge, may petition the court of chancery.

By 18 G. 3. c. 52. s. 76. The lord chancellor is empowered to allow certificates to bankrupts who have conformed, though not signed by four fifths of their creditors.

Bankrupt's duty
after allowance.

The bankrupt, after allowance of the certificate, shall attend on notice in writing from the assignees, to settle accounts, and shall have 2s. 6d. a day allowed for attendance; and if he shall neglect or refuse, he shall, on oath made by the assignees before the commissioners, be apprehended and committed to close gaol, by warrant of the said commissioners, till he conform. 5 G. 2. c. 30. s. 36.

Commissioners
pay.

To prevent expences, no money shall be paid out of the effects for eating or drinking of the commissioners, or of any other person; nor shall the commissioners have above 20s. each for each meeting; nor any schedule be annexed to the deed of assignment: Commissioners acting contrary hereto, shall be disabled for ever to act as such. *Id.* s. 42.

Half fees on re-
newing the com-
mission.

If by the death of commissioners, or otherwise, it be necessary to renew the commission, half fees only shall be paid. *Id.* s. 45.

Attorney's bill.

All bills of fees or disbursements demanded by any solicitor, clerk, or attorney, shall be settled and certified by a master in chancery, who shall have for the same 20s. *Id.* s. 46.

Bankrupt dying.

Bankrupt dying before distribution, shall not hinder the distribution. 1 J. c. 15. s. 17.

And if the certificate be allowed in the lifetime of the bankrupt, it is good, though it be not confirmed by the lord chancellor till after his death: for the operative force of it arises from the consent of the creditors; and when confirmed, it hath its effect from the beginning. 1 Atk. 77.

And the allowance to the bankrupt, being a vested interest, shall go to his executor. 1 Atk. 208.

Second divi-
dend.

In 18 months after issuing the commission, the assignees shall make a second dividend, and shall cause notice to be inserted in the gazette of the time and place the commissioners intend to meet to make a second distribution, and for the creditors who have not proved their debts to come and prove them: And at such meeting, the assignees shall produce their account on oath, and what is in their hands shall by order of the commissioners be forthwith divided. Which second dividend shall be final, unless a suit in law or equity be depending, or part
of

of the estate standing out that cannot have been disposed of, or that the major part of the creditors shall not have agreed to be sold, or unless some other or future estate of the bankrupt shall come to the assignees; which they shall, as soon as may be, convert into money, and in two months distribute the same in like manner. 5 G. 2, c. 30. f. 37.

But no suit in equity shall be commenced by the assignees, without consent of the major part in value of the creditors, who shall be present at a meeting of the creditors pursuant to notice in the gazette. *Id.* f. 38.

If the bankrupt shall be taken in execution, or detained in prison, for debt owing before his bankruptcy, by reason that judgment was obtained before the certificate was allowed and confirmed; any judge of the court, on producing the certificate, may order him to be discharged without fee. *Id.* f. 13.

Bankrupt's discharge.

And if the bankrupt's estate will pay 15s. in the pound, he shall be discharged from all the debts by him owing at the time he became bankrupt: And if he shall be arrested or prosecuted for any debt due before that time, he shall be discharged on common bail, and may plead in general, that the cause of action did accrue before he became bankrupt, and may give this act, and the special matter in evidence; and the certificate of his conforming, and allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining the certificate; and a verdict shall pass for the defendant, unless the plaintiff can prove that the certificate was obtained fraudulently, or can make appear a concealment by the bankrupt to the value of 10l. And if the plaintiff is cast, the defendant shall have full costs. *Id.* f. 7.

But if any commission of bankruptcy shall issue against any person who shall have been discharged by this act, or shall have compounded with his creditors, or delivered to them his estate, and been released by them, or been discharged by an act of insolvency, then the body only of such person conforming shall be free from arrest and imprisonment, but his future estate shall remain liable to his creditors (his tools of trade, necessary household goods and furniture, and necessary wearing apparel of himself and wife and children, only excepted), unless the estate of such person shall produce clear of all charges 15s. in the pound. *Id.* f. 9.

But

Sureties not
discharged.

But the bankrupt's discharge, and allowance of his certificate, will not preclude the creditors from proceeding against his sureties. 1 Atk. 83.

Commissioners
to account and
pay the over-
plus.

The commissioners shall, on lawful request of the bankrupt, declare how they have bestowed his lands and goods, and pay to him the overplus, if any there be. 13 El. c. 7. f. 4.

Proceedings to
be entred of re-
cord.

On petition to the lord chancellor, he may order the proceedings to be entred of record, to be at any time searched and produced as evidence. 5 G. 2. c. 30. f. 41.

Remedy on
commissioner
being sued.

Commissioner sued for any thing done on the statute of 13 El. and 1 J. may plead the general issue; and if he recovers, shall have his costs. 1 J. c. 13. f. 16. But there is no provision for any thing done by them, or by the assignees, on any of the subsequent statutes.

King's death
not to abate the
commission.

The commission shall not abate by the death of the king. 5 G. 2. c. 30. f. 45.

[Note; the act of 5 G. 2. c. 30. so often mentioned above, is but temporary, and by the 34 G. 3. c. 57. is further continued till the 1st June 1796; and from thence till the end of the then next session of parliament.]

A. Warrant to apprehend a bankrupt.

Westmorland. { To ———

WHEREAS a certificate under the bands and seals of ——— hath this day been produced before me ——— setting forth that a commission of bankruptcy is issued against ——— and that the said ——— is proved before them the said ——— being the major part of the commissioners authorized in the said commission, to be a bankrupt: And whereas application hath been made to me by ——— by order of the said commissioners, for the apprehending the said ——— These are therefore to require you, on sight hereof, to take and apprehend the said ——— and bring him before me or some other of his majesty's justices of the peace for the said county, to be proceeded against according to law. Given under my hand and seal this ——— day of, &c.

B. Comd

Bankrupt.

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B. Commitment thereon.

Westmorland. { To the keeper of the common gaol
at — in the said county, J. P.
esquire one of his majesty's justices
of the peace for the said county
sendeth greeting:

I Send to you herewith — being duly certified to be a bankrupt, requiring you to keep him in the said gaol until he shall be discharged according to law. Given —.

Baron Court.

THE *court baron* is a court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor. The business thereof is, to inquire of matters concerning the lord and tenant in their *civil* capacity only, as of the death of tenants since the last court, of alienations, surrenders, incroachments, trespasses, escheats, forfeitures, and such like. But with this court is frequently held, by grant or prescription, a *court leet*; the jurisdiction whereof extendeth to all *criminal* matters within the precinct, for the preservation of the king's peace: For which see the title *Leet*.

Barratry.

- I. *What it is.*
- II. *How punished.*

I. *What it is.*

THIS word *barratry* we have received either from the *Danes* or *Normans*, or both: for *barratta* in the *Danish*, and *baret* in the *Norman*, do equally signify a quarrel or contention.

And a *barrator*, in legal acceptance, doth signify a common mover, exciser, or maintainer of suits or quarrels, either in courts, or in the country. 1 Inst. 368.

1 Haw. 243.

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P

A common

Barratry.

A common mover] It seems clear that no one can be a barrator in respect of one act only; for every indictment for such crime must charge the defendant with being a common barrator. 1 Haw. 243, 4.

Mover, exciter, or maintainer] Yet it seemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. 1 Haw. 243.

Also it hath been holden, that a man shall not be adjudged a barrator, in respect of any number of false actions brought by him in his own right; for in such cases he is liable to costs. *Id.*

In courts] Either courts of record; or not of record, as in the county, hundred, or other inferior courts. 1 Inst. 368.

Or in the country] In three manners: 1. In disturbance of the peace. 2. In taking or keeping of possession of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing of calumniation, rumours, and reports, whereby discord and disquiet may grow between neighbours. *Id.*

II. How punished.

By the statute of 34 Ed. 3. c. 1. *The justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take and chastise them, according to their trespasss or offence.*

And although this statute doth not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding against the form of the statute, is holden to be good, and agreeable to many precedents. Cro. Eliz. 148. 1 Haw. 244.

But it hath been resolved, that such indictment is not good, without also concluding against the peace; for this is an essential part of it, as being an offence by the common law. 1 Haw. 244.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain place; because, from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. *Id.*

Which

Barratry.

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Which case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 Haw. 244. 2 Haw. 226, 7.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, he ought also to be further punished, by being disabled to practise for the future. 1 Haw. 244.

And by the 12 G. c. 29. If any person, who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor; he shall be transported for seven years. s. 4.

Bastards.

Concerning the settlement of bastard children, see title Poor.

- I. Who shall be deemed a bastard.
- II. Securing the reputed father.
- III. Bond to indemnify the parish.
- IV. Order of filiation and maintenance by the justices.
- V. Appeal against the order.
- VI. Punishment of the mother and reputed father.
- VII. Mother or reputed father running away.
- VIII. Murdering a bastard child.
- IX. Capacity of a bastard as to inheritance.

I. Who shall be deemed a bastard.

Meaning of the
word Bastard.

THE word *bastard* seemeth to have been brought unto us by the *Saxons*; and to be compounded of *bast*, vile or ignoble, and *start*, or *stort*, signifying a rise or original. By the common people in the north (amongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

Bastard born in
lawful mar-
riage.

Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244.

M. 6 G. 2. Lomax and Holmden. In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Calib Lomax*, esquire, deceased; which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impossibility*, but an improbability only; that was not thought sufficient, and there was a verdict for the plaintiff. *Str.* 940.

And it is said, that formerly if the husband was within the four seas, no proof of *non access* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now entirely departed from; and though the husband and wife are both in *England*, if there is sufficient proof that he had no access to her, the child will be a bastard. And this was determined in the case of *Pendrell and Pendrell, M. 5 G. 2.* which was an issue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Stafford-*

Staffordshire; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by court and counsel, on the trial at *Guildhall*, before L. Ch. J. *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced in the determination. *Str.* 925. *Andr.* 9.

T. 10 G. 2. *K.* and the Inhabitants of *Bedall* in *Yorkshire*. An order was made upon one *Moor*, as the putative father of two bastards, born of the body of *Elizabeth* the wife of *Richard Sharplefs*: in which it was stated, that for seven years before, the husband had had no access to her, she having never seen or heard of him all that time, and not knowing whether he was alive or dead; which the justices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly. Upon appeal to the sessions, the case is stated with some variation: that in 1728, she was married to *Sharplefs*, then a soldier in *Mullin's* troop, in a barn, by a person not in the habit of a clergyman; that there had been no access for seven years; but it appearing by a certificate from the commissary general's office, and from the evidence of *Simon Clarkson*, that one *Richard Sharplefs*, who he was told was formerly in *Mullin's* troop, was mustered as a private gentleman in the third troop of horse guards, from *June* 25, 1733, to *Feb.* 23, 1736, though *Clarkson* said he could not take upon him to swear that it was the same *Richard Sharplefs* pretended to be married as aforesaid; upon this supposition of the husband's being alive, the sessions were of opinion, the children were not bastards, and reversed the order of the two justices. And now upon debate, the order of sessions was quashed, and the order of two justices confirmed: for it being stated in both orders, that there was no access according to the case of *Pendrell* and *Pendrell* (above), it was immaterial whether the husband was alive or not. *Str.* 1076.

And, *M.* 10 *W.* *K.* and *Abberton*. The case was, a feme covert, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not

in England from the time of her conception, till she was brought to bed. The question was, whether this child was a bastard, especially within the words of the statute of the 18 Eliz. (hereafter following) which saith, *children begotten and born out of lawful matrimony*; which cannot be said of this case, the mother being married at the time of the birth of the child; and if such a mother should kill such child, she could not be guilty of murder within the statute of the 21 J. c. 27. But by the court; He is a bastard who is begotten and born of a feme covert, whilst the husband is beyond the four seas. And in a real action if general bastardy was pleaded, the bishop ought to certify such a one a bastard. And where a man is a bastard, he is such to all purposes, and why not within the 18 El. For though the statute of 21 J. is a penal law, yet the act of 18 El. is a remedial law. *L. Raym.* 395, 396.

How far the wife's oath shall be admitted in such case.

But this non-access of the husband ought to be proved otherwise than upon the wife's oath; as in the following case; *M. 8 G. 2. K. and Reading*. The defendant *Reading* was adjudged, by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one *Almont of Sherborn*. The said woman, on the appeal, gave evidence, that the said *Reading* had carnal knowledge of her body in or about August 1732, and several times since; and that her husband had no access to her from May 1731, to the time of her examination in that court, being the 3d of October 1733, and that the said *Reading* was the father of the said child. And the question on removal of the same into the king's bench was, whether the wife in this case should be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact but that of incontinence, and that this she must be admitted to be witness to from the necessity of the thing; but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others. 2 *Seff. Ca.* 175.

And in the case of *K. and Roake, M. 26 G. 2.* The order of the two justices states; it appears to us by examination of *Dorothy* the wife of the reverend Mr. *Henry Bird*, that she lived separate from her husband from *Michaelmas*

*Christmas 1750, to February 1752; and that she has not in all that time seen or been with him, he being a prisoner in York castle: That John Rook had carnal knowledge of her body, on the 30th of January 1750, and got her with child of the bastard. Exception was taken, that the wife in this case was an incompetent witness. By Lee Ch. J. and the court: How far the evidence of the wife is to be admitted upon orders of bastardy, is now settled in the above case of K. and Reading; where the wife appeared upon the order to be the only witness to charge the putative father: upon this, the order was quashed; and the reason given by the court was, that the wife might be admitted to prove the act of adultery *ex necessitate*, for of that there could be no other evidence; but not to prove other facts, of which there may be witnesses. The case being similar, must be determined upon the authority of that case. The wife's examination alone does not make the order bad, but the facts to which she is examined. The necessity of the thing excepts her, as to the fact of adultery, out of the general rule; but not as to the fact of no access, for that may be proved by particular circumstances examinable by the justices below. But upon this order she appears to be the only evidence: and her declarations are not admissible to bastardize her issue. And the order was quashed. 1 Wilson, 340.*

But in the case of K. and Bedull abovementioned, The order reciting, that on the examination of the mother, *and on other proof*, it appeared that her husband had no access to her, was held to be good; for there the woman's oath is not set forth as the only evidence, but *other proof*, which must be intended legal proof. *And. 8.*

And in the case of K. v. Bramley, T. 35 G. 3. which was upon an order of removal of Sarah the widow of J. Ward, deceased, and her three children, from Leeds to Bramley. On appeal, the respondents, in order to prove the marriage of J. Ward with the said Sarah, produced witnesses, who proved that they had cohabited together as man and wife, and were reputed so to be until the death of J. Ward. The appellants produced Sarah Ward as a witness to prove that she never was married; or that if she was, it was in Ireland, under such circumstances as by the laws of Ireland rendered it wholly void; and also offered witnesses to prove declarations made by both J. and S. Ward, at different times, that they never were married. But the justices rejected the same, and confirmed the order of the justices, subject to the opinion of this court,

whether this evidence was admissible or not.—*L. Kenyon*, Ch. J. This evidence was certainly admissible, though the justices at the sessions were to judge of the effect of it. In the case of *K. v. St. Peter's*, it was expressly held, that the supposed husband was a competent witness to disprove the marriage. There are also many other cases in which it has been decided, that the parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children, there is no reason why they should be considered as incompetent, when called upon to prove that the children are illegitimate. But in all these cases, such testimony is open to great observation. *Durnf. and East*, 6 V. 330.

Child born during a divorce.

M. 5 An. St. George's and St. Margaret's Westminster. Where a woman is separated from her husband by a divorce *a mensa & thoro*, the children she has during the separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed: but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended. But if a special verdict find the man had no access, it is a bastard; and so was the opinion of lord *Hale* in the case of *Dickins and Collins*, 1 *Salk.* 123.

On voluntary separation.

But if a man and his wife agree voluntarily to separate, the law will presume access, unless the negative be shewn. 1 *Black. Com.* 457.

Woman with child when married.

If a woman grossly consent marry, it is the child of the husband; for when they testify their consent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his, for at that time the child is one with the mother, and therefore in taking the mother, he takes the child with her. 1 *Roll. Abr.* 358.

Widow having a child after her husband's death.

The law hath appointed no exact certain time, for the birth of legitimate issue, by the widow after the death of her husband. 1 *Danv.* 726.

M. 7 J. Alsep and Bowtrell. The question was, whether, the woman being delivered of a child forty weeks and nine days after the death of her husband, such child should be deemed a bastard. And it was proved, that her deceased husband's father did much abuse her, and caused her to lie in the streets; and three physicians (two of them being doctors of physick) made oath, that the child came in time convenient to be the child of the party who died; and that the usual time for a woman to go with child, is nine months and ten days, to wit, solar months,

at

at thirty days to the month, and not lunar months; and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more. And the physicians farther affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind. And the child was adjudged to be legitimate. *Cro. Jac.* 541.

II. Securing the reputed father.

By the 6 G. 2. c. 31. Whereas the laws now in being are not sufficient to provide for the securing and indemnifying parishes and other places, from the great charges frequently arising from children begotten and born out of lawful matrimony; it is enacted, *That if any single woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable to any parish or extraparochial place; or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish or extraparochial place; and shall in either of such cases, in an examination (A) to be taken in writing, upon oath, before one justice of the county, city, or town corporate, where such parish or place shall lie, charge any person with having gotten her with child; it shall be lawful for such justice, upon application made to him by the overseers of the poor of such parish, or one of them, or by any substantial householder of such extraparochial place, to issue out his warrant (B) for the immediate apprehending such person so charged as aforesaid, and for bringing him before such justice, or before any other of his majesty's justices of the peace for such county, city, or town corporate: And the justice before whom such person shall be brought shall commit (C) him to the common gaol or house of correction, unless he shall give security (D) to indemnify such parish or place, or shall enter into a recognizance (E) with sufficient surety, upon condition to appear at the next general quarter sessions, or general sessions, of the peace, to be holden for such county or liberty, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the 18th year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony.* §. 1.

Issue out his warrant for immediate apprehending] If the constable, having a warrant to apprehend the reputed father,

father, shall willingly or negligently suffer him to escape; he may be bound over to the sessions, and there indicted, fined, and imprisoned; and under the influence thereof be compelled to make satisfaction to the prosecutors.

To appear at the next general quarter sessions] It hath been usual, to bind such person to appear, not at the next sessions generally, but at the next sessions after the child shall be born; upon a principle of convenience, lest, if the child should not be born, or the mother not be able to go before the justices in order to filiate the child, before the next sessions, the reputed father should be gone, and the design of the act be frustrated. But the words of the act must be pursued; and therefore he must be bound *to appear at the next general quarter sessions* [or, *general sessions*] of the peace to be holden for such county or liberty, and to abide and perform such order or orders as shall be made in pursuance of an act passed in the 18th year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony.

Elizabeth] This statute recites the name of queen Elizabeth with the letter *s*; whereas the statutes themselves of that queen's reign do always exhibit her name with a *z*. Which is noted here only, as not exactly agreeable to that precision which ordinarily is required in reciting acts of parliament in cases penal.

And if such woman shall die, or be married, before she shall be delivered, or miscarry of such child, or shall appear not to have been with child at the time of her examination, such person shall be discharged from his recognizance at the next sessions, or immediately released out of custody by warrant of one justice residing in or near the limits where such parish or place shall lie. s. 2.

And on application made by any such person, who shall be committed to any gaol or house of correction, or by any person on his behalf, to any justice residing in or near the limits where such parish or place shall lie; such justice shall summon (F) the overseers of the poor of such parish, or one or more substantial householders of such extraparochial place, to appear before him at a time and place to be mentioned in such summons, to shew cause why such person should not be discharged: And if no order shall appear to have been made, in pursuance of the 18th of Elis. within six weeks after such woman shall have been delivered, such justice may discharge (G) him from his imprisonment. s. 3.

But

But it shall not be lawful for any justice to send for any woman, before she shall be delivered, and one month after, in order to her being examined concerning her pregnancy; or to compel any woman, before she shall be delivered, to answer any questions relating to her pregnancy. c. 4.

To compel any woman] *M. 11 G. K. and Chandler.* Indictment for secreting a woman big with an illegitimate child, so that she could not be had to give evidence about the father. The defendant demurred. And by the court, judgment must be given for the defendant, for the child cannot be illegitimate before it is born, there being always a possibility that it may be born in lawful wedlock. And by this act the woman is not to be compelled. *Str. 652. L. Raym. 1368.*

III. Bond to indemnify the parish.

By the aforefaid statute of 6 G. 2. c. 31. The justice before whom the party shall be brought shall commit him, unless he shall give security to indemnify the parish, or enter into recognizance to appear at the sessions.

In this case, whether a bond or other security ought to be made to the churchwardens and overseers and their successors, or to their executors or administrators, hath been questioned: concerning which the author of the *Readings upon the Statutes* saith thus: Those gentlemen who have taken upon them to direct the officers, to have such bonds or other securities made to them and their successors, would do well to consider, whether the churchwardens and overseers are such a corporation as can purchase, sue and be sued: And whether bonds, being things in action, it may not be difficult for the successors of the churchwardens and overseers, to whom they were made, to maintain an action on a bond made to their predecessors. It is true, churchwardens may maintain an action for the goods of their church: but they are not such a corporation, as can take or purchase lands, or take securities for the use of their church, except in *London*. And it was never pretended, that the churchwardens and overseers of the poor are a corporation in any respect in relation to the poor, and consequently can neither sue nor be sued as such. *Read. Bask.*

To whom the bond ought to be given.

And indeed, upon the whole, the taking of a bond in any kind seemeth not so convenient for the parish, as an order made by the justices; because the suing upon a bond is both tedious and expensive, whereas the course of carrying an order into execution is very short and easy.

But

Bastards.

But then, on the other hand, a bond will bind a man's executors; but the order of the justices being obligatory only upon the man himself, when he dies, the order dieth with him.

Action on a bond to maintain a bastard child, no more can be recovered than the money actually expended.

M. 21 G. 3. Kirk and Strickland. It was moved for a rule to shew cause, why the defendant should not be discharged upon filing common bail. It was an action of debt upon a bond, conditioned for the indemnification of a parish against a bastard child. The penalty in the bond was 50l.; and the plaintiff, in his affidavit for holding the defendant to bail, had sworn that he was justly indebted to him in that sum. But the defendant, in the affidavit on which this motion was grounded, swore that only 3l. and some odd shillings were really due. The court said the conduct of the plaintiff was altogether unjustifiable, and that he was liable to an action: That in the case of a bond conditioned for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but, in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition. At first, however, they seemed to think they could not relieve the defendant upon this summary application, it having been a uniform rule not to go into the merits, upon such a motion, but to take the matter as it stood upon the affidavit to hold to bail; but at last they granted the rule, declaring that they were persuaded the plaintiff would not venture to shew cause against it. *Douglas, 432.*

Nor more than the whole penalty of the bond.

E. 18 G. 3. Brangwin and Perrot. It was moved for leave to pay 40l. (being the whole penalty of a bond to indemnify a parish against a bastard child) into court, with costs. It was objected, that this was an action for a single breach of the bond, on which the parish was entitled to recover; after which, the penalty shall still remain in full force, to answer subsequent breaches, as they may arise, *in infinitum*. But not allowed by the court: And the L. Ch. J. *De Grey* said, This is so plain a case, that nothing that one can say can make it plainer. The bond ascertains the damage by consent of parties. If therefore the defendant pays the plaintiff the whole stated damages, what can he desire more? *Black. Rep. 1190.*

Officers need not an order of maintenance, to recover upon a bond given to indemnify a parish.

T. 29 G. 3. Hays and Another v. Bryant. In the common pleas. Debt on a bond in the penalty of 50l. brought by the parish officers of *Ridgwell* in *Essex*, conditioned, to indemnify the parish of *Ridgwell* against the charges of such bastard child or children as one *Elizabeth*

Isabel Winch then went with, and should be delivered of (a).-

It was proved at the trial, that the defendant had agreed to pay 2s. 6d. *per week*, which he in fact paid for some time, and then refused, alledging that the sum was too great.—The counsel for the defendant objected, that the plaintiffs or parishioners were not obliged to maintain the children without a justice's order for that purpose. But Mr. *J. Wilson*, who tried the cause, over ruled the objection; and a verdict was found for the plaintiffs.—A rule having been granted to shew cause why the verdict should not be set aside, and a nonsuit entered; *Bond*, serjeant, repeated the objection which he had made at the trial, and cited the case of *Simpson v. Johnson* (above).—*Cockell*, serjeant, was going to shew cause, but was stopped by the court, who held clearly that an order of justices was not necessary to make the officers of the parish liable to do what they were otherwise under a legal obligation of doing, namely, to provide necessaries for the children, and therefore discharged the rule. *Caf. by H. Black. 253.*

It sometimes happens, by the mother's removing into another parish, that the child is not born in the parish indemnified; but this doth not absolutely quit the bond: because there is a consequential damage to the parish indemnified, which may affect the reputed father. For where the child goes with the mother for nurture, the parish where the child was born, and not the parish where it resides with the mother, is bound to maintain it. As in the case of *Simpson and Johnson, M. 19 G. 3.* which was a case reserved from the assizes for the opinion of the court, on an action of debt upon a bond. The defendant *Johnson*, being apprehended by virtue of a warrant under the statute of 6 G. 2. gave bond in the usual form to indemnify the parish of *Wickham St. Paul*, against all costs, charges, and other demands, touching and concerning a child of which *Jemima Waals* was then pregnant, and likely to be born a bastard. It happened, that before the birth of the child she removed herself voluntarily from *Wickham St. Paul* to the parish of *Gueffingthorpe*, and was there delivered of the same bastard child. After her delivery, she returned to the parish of *Wickham St. Paul*, where her legal settlement was, carrying her child with her, and received 1s. 6d. weekly from the plaintiff *Simpson*, who

Mother removing from the parish indemnified, before the child is born.

(b) *N. B.* She was afterwards delivered of two children.

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was one of the overseers of the poor there, for the maintenance of herself and her child. No order was made by any justice, directing the allowance of the said 1s. 6d. or any other sum to be made by the parish officers of *Wickham St Paul*. And no demand was made at any time on the defendant *Johnson*, who lived in the adjoining parish of *Gueslingthorpe*; but a demand was made on one of his sureties, who refused to pay.—The court were so clearly of opinion with the defendant, that they would not hear his counsel. *L. Mansfield* said, that the payment by the parish officers of *Wickham* was doubly voluntary; first, because there had been no order upon them to pay; and secondly, because they were not liable to maintain the child, but the parish where it was born, and they should have applied to the officers of that parish. *Douglas*, 7.

Children under the age of 7, living with their mother at her place of settlement, are to be there maintained by the parish where they belong.

This question, whether children under seven years of age, who are living with their mother for nurture at the place of the mother's settlement, but whose own settlement is in another parish, are to be maintained by the parish where the mother lives and is settled, was determined in the case of *Darlington and Hemlington*, *H. 17 G. 3.* *Eleanor Guy* went with a certificate from the township of *Hemlington* in the North Riding of the county of *York*, to the township of *Darlington* in the county of *Durham*, and during her residence at *Darlington* bore two bastard children there. Afterwards becoming chargeable, two justices removed the said *Eleanor Guy* from the said township of *Darlington* to the said township of *Hemlington* which gave the certificate; but said nothing in their order of removal concerning the two bastard children, one of whom was then four years of age, and the other two years. The mother took them with her to *Hemlington*. Whereupon *Hemlington* applied to some of the justices in the county of *Durham*, for an order upon the township of *Darlington* to maintain the said two bastard children then residing at *Hemlington* with their mother as nurse children. And after summoning the overseers of *Darlington* to shew cause, two justices of the county of *Durham* made an order upon the overseers of *Darlington* to pay to the overseers of *Hemlington* two shillings weekly, for the maintenance of the said two bastard children, whilst nurse children with their mother at *Hemlington*. The overseers of *Darlington* appealed against this order of maintenance; but offered to receive and provide for the children in the township of *Darlington*. The single question before the sessions was, "Whether the township of *Darlington* was or

"was not obliged to pay to the township of *Hemlington* any relief for the two bastard children, whilst they remained with their mother as nurse children at, and at the expence of, the said township of *Hemlington*, she refusing to part with them to the township of *Darlington*?" And the sessions, being of opinion that they were not obliged, quashed the order of maintenance. The proceedings being removed into the court of king's bench, the court were of opinion, that the township of *Darlington* was obliged to maintain the two children at *Hemlington*, whilst residing there with their mother as nurse children; and therefore quashed the order of sessions, and affirmed the order of the two justices. *Cald. Cas. 6.*

And there is no difference as to this point between bastards and legitimate children: As in the case of *Shermandbury* and *Bolney* (*Carib. 279.*) A woman with three children, all under seven years of age, being settled in *Shermandbury*, married a man settled in *Bolney*. After the marriage, the mother and three children were sent to *Bolney*. The parish of *Shermandbury*, before the marriage, allowed 3s. a week for the three children; and the payment being discontinued after the marriage, two justices, on complaint of the parish of *Bolney*, made an order that *Shermandbury* should continue to pay the 3s. The sessions, and afterwards the court of king's bench, confirmed the order of the justices. And the court said, This case is within the equity of the statute for relief of the poor; and there is no reason that *Shermandbury* should be discharged of the children by their mother's marriage. *Douglas, 10.*

IV. Order of filiation and maintenance by the justices.

If security hath not been given to indemnify the parish, the next thing in the course of proceeding is the order of filiation and maintenance to be made by the justices.

By the 18 El. c. 3. *Concerning bastards begotten and born out of lawful matrimony, the said bastards being now left to be kept at the charges of the parish where they were born, to the great burden of the same parish, and to the evil example and encouragement of lewd life, it is enacted, that two justices (1 Q.) in or next unto the limits where the parish church is, within which parish such bastard shall be born, upon examination of the cause and circumstances (H), shall and may by their discretion, take order (1) as well for the punishment of the mother and reputed father, as also for the better relief of such parish,*

Bastards.

parish, in part or in all; and shall and may, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly, or other sustentation, for the relief of such child, in such ways as they shall think meet and convenient. And if, after the same order by them subscribed under their hands, the mother or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then every such party so making default in not performing the said order, to be committed (K) to ward in the common gaol, there to remain without bail or mainprize, except he or she shall put in sufficient surety (L) to perform the said order, or else personally to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken; and also to abide such order, as the the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any); and if at the said sessions, the said justices shall take no other order, then to abide and perform the order before made, as is above-said.

The sessions may make an original order of bastardy.

And by the 3 Cha. c. 4. All justices of the peace within their several limits and precincts, and in their several sessions, may do and execute all things concerning that part of the said statute, that by justices of the peace in the several counties are by the said statute limited to be done. Upon which statute of the 3 Cha. there hath been great diversity of opinion, whether or no the sessions hath power thereby to make an original order in the case of bastardy, without the matter coming before them by way of appeal. But it seems now to be fully settled, that the sessions have power to make an original order, as appears by the following cases:

H. 9 Cha. Pridgeon's case. Pridgeon was brought to the bar upon an *habeas corpus*; and it appeared, upon the return thereof, that upon complaint to the two next justices he was by them ordered to keep a bastard child, he being according to the said order the reputed father. From this order he appealed to the next session; at which sessions the matter being examined, he was discharged, and the order of the two justices repealed. Afterwards, at another sessions, the matter being re-examined, it was ordered according to the first order of the two justices, that he should be accounted the reputed father of the bastard, and should keep it; and that if he did not perform it, he should be apprehended and committed. And thereupon being apprehended and committed, and all this matter returned, the court held, that he being discharged at the next sessions, to which he appealed according to the statute

statute of 18 *El.* the second sessions hath no power to alter it. And because none were there to maintain this return, he was bailed, and day given, that if other matter were not shewed before such a time, he should be discharged. Afterwards, this matter being moved again, all the court delivered their opinions *seriatim*, that the order in the first sessions was conclusive, and the order in the last sessions was merely void. For the statute of 18 *El.* appointing, that upon appeal to the sessions from an order of two justices, their order shall bind him who is adjudged to be the reputed father; and in this case, having appealed to the sessions, and they making an order in court, that order is final, and no other sessions nor authority may meddle therewith. And it was held, that the statute of 3 *Cba.* doth not aid this case; for the statute there is, that *if the two next justices make not provision for the bastard, the justices at their quarter sessions shall settle an order for keeping of the bastard as the two next justices ought*: But it doth not give more power or authority, nor gives authority to one sessions to alter that which in a former sessions was ordered. *Cro. Car.* 341. 350.

E. 10 Cba. Slater's case. William Slater was by Elizabeth Etes charged with the getting of a bastard child on her body. The two next justices did not make any order in it according to the statute of 18 *El.* But the cause came first to be heard at the sessions, where the justices ordered that Slater should be discharged of the child, and adjudged Alexander Leigh to be the reputed father. Afterwards, on complaint to the judges of assize, the judges ordered, that two of the next justices to the parish where the child was born (naming them) should take consideration thereof according to the statute, and settle such course therein as to justice appertained: Whereupon those two justices declared the said William Slater to be the reputed father; and on his refusing to pay the sum ordered by them for the maintenance of the child, they committed him. Upon removal of the proceedings into the court of king's bench, these two points were resolved by the whole court: 1. That before the statute of 3 *Cba.* the sessions had no authority to meddle in the case of bastardy, till the two next justices according to the statute of 18 *El.* had made an order therein; and that then, and not before, on the party refusing to perform the order, and giving security to appear at the sessions and abide such order as the justices then and there should make, the justices at the sessions might make a new order, otherwise

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not. 2. That by the statute of 3 *Cha.* the justices in sessions have power originally to make an order; and therefore that the first order made by the sessions was in this case good and legal, and the second order made by the two next justices void, and could not alter or revoke the order which was first made by good authority. And for proof thereof was cited *Pridgeon's* case above. *Cro. Car.* 470.

T. 13 Cha. Wood's case. On complaint to the sessions against a woman having a bastard child, the matter was by them referred according to law to the two next justices to have the examination and ordering thereof. The said two justices made an order against *John Wood* to be the reputed father, and ordered him to pay a weekly sum towards the maintenance of the said child. *Wood* appealed to the sessions. And the justices there, on a re-examination of the matter, disallowed of the order made by the two justices, and they there made a new order, by which they charged one *William Cole* to be the reputed father. On a reference of the matter to Sir *William Jones* judge of assize, and both the orders being read in court, that is, the order made by the two next justices, and the subsequent order made at the sessions, he would not enter into the re-examination of this cause, but did, *in omnibus*, affirm the last order made by the sessions upon appeal to them from the first order; which last order made at the sessions was final, and no appeal to be admitted against it: and this, he said, had been adjudged divers times, and mentioned particularly *Pridgeon's* case above. 2 *Bulstr.* 355.

T. 4 An. 2. and Weston. *Weston*, being adjudged by the two next justices to be the reputed father, appealed to the sessions, where the order was confirmed, and he committed for not paying the money ordered. It was objected, that the session should have proceeded against him upon his recognizance. By *Holt Ch. J.*: If they proceed on the 18 *El.* the sessions hath no power to commit, but to proceed upon his recognizance; but if on the 3 *Cha.* the sessions may commit as the two justices might have done, that is, unless the party put in security to perform the order, or to appear at the next sessions. 1 *Salk.* 122.

M. 8 G. K. and Cleg. An order of bastardy was made at the sessions (which was admitted to have original jurisdiction); and it was objected, that it was not said in the order that the defendant was ever summoned or appeared, and natural justice required that he should at least have
an

an opportunity to defend himself.——By *Pratt Ch. J.* I believe these orders made originally at sessions are very rare, the usual way being to bring the matter before the sessions by way of appeal from the order of two justices. Now it it should be taken, that the order of two justices will be well enough, without their shewing a summons or appearance; yet I think this case will fall under a very different consideration. For in the other case, the party has an opportunity to relieve himself by appeal, whereas upon an original order at sessions he can have no opportunity to bring the matter to a farther examination; so that it is but a lewd woman's going behind his back and swearing a bastard upon him, by which means the most innocent man in the world may be condemned.——But the matter went off upon the point, whether it was necessary that the summons should appear upon the face of the order. *Str. 475.*

Finally, in the case of *K. and Greaves, E. 21 G. 3.* An original order of bastardy was made at sessions, which being removed into the king's bench by certiorari, a rule was granted to shew cause why it should not be quashed. The principal objection was, that the sessions have no original jurisdiction. In support of the order it was said, that there are four or five cases which have decided that the statute of 3 *Cha.* gives to the sessions an original jurisdiction. And the order was confirmed. *Douglas, 610.*

So that whatever may be understood to have been the primary intention of the statute, the point seems now to be settled upon the authority of these cases, that the sessions have power to make an original order in case of bastardy: But instances of this kind have been so exceeding rare, that no case hath occurred wherein it hath been determined; what or whether any remedy the reputed father is entitled to, if he is dissatisfied with such order. In *Weston's* case above-mentioned, *Holt Ch. J.* said, that the sessions may commit as the two justices might have done, unless the party put in surety to perform the order, or to appear at the next sessions: Which implies an appeal from the same court to the same court, a thing not usual in other like cases, an appeal importing the removal of a cause from an inferior to a higher jurisdiction. On the other hand, *L. Ch. J. Pratt* in *Gleg's* case, said, that upon an original order at sessions, the party hath no opportunity to relieve himself by way of appeal, and from hence urges the extreme necessity of a strict and regular summons of the reputed father, lest he happen to be condemned unheard.

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But

But the sessions cannot discharge a recognizance taken before a justice for the father's appearance at the sessions, and to abide the order; nor compel him to give fresh sureties.

But altho' the sessions have an original power to make an order of bastardy, they cannot order the father to give security for the performance of that order, as appears by the case of *K. v. Price*, *H. 35 G. 3.* At the quarter sessions at *Worcester*, the defendant was charged with being the father of a bastard child, and was then present in court in pursuance of a recognizance entered into on a prior day before a justice, to appear at the then next sessions, &c. and to perform such order as should be made in pursuance of the 18 *Eliz.* The sessions having heard the complaint, &c. on oath, adjudged the defendant to be the father of the said child, and made an order upon him to pay 20s. for the expences of the lying in, and for the maintenance of the child till that time; and the further sum of 1s. 6d. weekly from that time so long as the child should continue chargeable. And also further ordered the defendant to find sufficient sureties for the performance of that order; and upon his alledging, that he was not compellable to find such sureties, they committed him to the house of correction until he should find sufficient sureties; and also directed that the recognizance of the defendant for his appearance and conformity at those sessions should be discharged. The above order having been removed by *certiorari*, a rule was obtained, calling on the prosecutors to shew cause why that part of it by which the defendant was committed for want of sureties, should not be quashed.—*L. Kenyon Ch. J.* said, that the case of *K. v. Fox* decided this case, (and his lordship then read a note of that case from a manuscript of his own,) and added, as that case was determined on great consideration, and by such able judges, and is directly in point, it ought to govern the present case. Therefore so much of this order of sessions as respects the giving of security for the performance of the order and the discharging of the defendant's recognizance must be quashed, and the rest of the order confirmed. *Durnf. and East*, 6 V. 147.

The said bastards being now left to be kept at the charges of the parish where they be born] For at that time they could have no other settlement. There were only two kinds of settlements then existing; the one was by birth, and the other where the person should have resided for the most part during the space of three years. So that till the child should be three years of age, it could possibly have no other settlement. And the place of birth continues to be the settlement of bastard children still, unless in some few excepted cases.

Two justices in or next unto the limits where the parish church is] By this measuring, as it were, from the parish church, it seemeth that no other justices can intermeddle. *Two next justices.* And in this matter this statute of the 18 *El.* is different from most other statutes: for generally where power is given to two justices, the statutes express that two or more justices may do such a thing: but here the statute saith only, that two justices, dwelling in or next unto the parish, shall have power to take order therein. And Mr. Dalton makes a *query*, what shall be done, if the two next justices cannot agree in the order, or shall make no order: And this case, tho' likely enough to happen, hath not yet been determined. If they will not proceed at all, there seemeth to be no doubt, but that they may be compelled by a *mandamus*. But if they cannot agree; whether one justice, not the next, may join with either of the other in making an order, doth not appear to have been determined. Or, in this case there seems to be a particular reason for applying to the sessions for an original order. Or they may by consent make an order, and bring the matter to the sessions by way of appeal.

Shall and may by their discretion] Here is no time limited for their proceeding in this matter; so that the order may be made at any time after the birth of the child. *An order may be made at any time after the birth.*

And in the case of *K. and Miles, M. 1 G.* On motion to quash an order of bastardy, it was resolved, that if the father run away and return, tho' 14 years after, yet an order to fix the child on him is good; for there is no statute of limitation in these cases. *1 Sess. C. 77.*

But by the aforesaid statute of the 6 *G. 2.* if the reputed father is in prison, and no order shall be made in six weeks after the birth of the child, he may in such case be discharged from his imprisonment; but the order nevertheless made upon him afterwards will be good.

Take order] Herein they must proceed as in all other like cases, by giving the party accused an opportunity of being heard in his defence. In the case of *K. and Cotton, T. 6 & 7 G. 2.* An information was moved for against the defendant, who with another justice made an order of bastardy upon one *Fitzgerald*, without summoning him to appear before them to make his defence. Upon appeal to the sessions he was acquitted, and put to great expences; which it was insisted was contrary to natural justice. By Mr. *J. Page*; no man in an office can be supposed to be so ignorant, as not to know it is against natural justice, to convict a man without a summons; the examination *ought*

Reputed father to be summoned.

ought to be so made, that the truth may appear, and this must be by examining both sides, otherwise it is partial; the scandal, the expence, and the disorder in Mr. Fitzgerald's family, are things that ought to be considered; here was no taking by warrant, and therefore an action of false imprisonment would not lie; and this is the only method can be used to punish the justice. Mr. J. Probyn; the principal objection about a summons is right in law, and in reason; possibly an action on the case might be framed; there may possibly have been only an error in judgment, and it is hard to grant an information. Mr. J. Lee; If this was strictly a conviction against which no appeal lies, an information ought to be granted; but he thought the matter was not so very strong in the case of orders. And the rule was discharged. 1 *Seff. Cas.* 179.

Summons by a
third justice is
sufficient.

E. 8 G. 2. *K. v. Taylor and Neale*. Motion in the king's bench for an information against the defendants, two justices of *Devonshire*, for making an order on one *Nicholas Mould*, adjudging him to be the putative father of a bastard child, without summoning him, and also for refusing to hear his witnesses. On shewing cause, it appeared that he was summoned by a third justice, which the court held to be sufficient. And by L. *Hardwicke* Ch. J. If the party, being summoned, will not attend himself, there is no reason the justices should hear any defence made for him; for if that were allowed, no offender of this sort would appear. Therefore the justices in this case acted right. And it is but as this court does, when orders of bastardy are removed hither by *certiorari*: for we never allow any exceptions to be taken to the order, unless the party attend in person; that the court may take care of him, and make him indemnify the parish, if the order is good. 2 *Seff. Cas.* 192. *Cases in the time of L. Hardwicke*, 112.

Mother marry-
ing before the
order is made.

By charging such mother] If the mother shall marry before any order made, it hath been doubted whether the justices can then charge her, as having no effects of her own, the same by the marriage being vested in the husband. As in the case of *Ellen Bent*, E. 5 G. 3. She was delivered of a bastard child in the parish of *Clifton*. After which, and before any order made, she married one *Abraham Taylor* of the parish of *Middleton*. The overseers of *Clifton* apply to the justices, who made an order of filiation, charging her with 8 d. a week towards the relief of the parish. She pleaded her utter inability, and refused to pay. Upon which the justices commit her to the house of

of correction. She was brought up by *babeas corpus*, and her counsel moved for her discharge, insisting upon the illegality of her commitment; for that, being a married woman, she was not an object of the justices jurisdiction, and the husband was not summoned.——But by the court: A feme covert is liable to be prosecuted for crimes committed by her. This woman has disobeyed the order of the justices, and the statute prescribes the punishment here inflicted upon her. There is no need to summon the husband, in a criminal prosecution against the wife. *Burr. Mansf. 1681.*

M. 34 G. 3. K. v. Ravenstone. On the appearance of *W. Start* (on his recognizance taken before a magistrate for *Leicestershire*, to answer a charge against him for being the putative father of a bastard child, of which one *S. Hagg* had been delivered in *Ravenstone* in *Leicestershire*) at the *Leicester* sessions, the parish officers of *Ravenstone* applied to the court to make an order of filiation and maintenance on *Start*; when that court ordered that *Start* should be discharged from his recognizance, and that the application should be dismissed, subject to the opinion of this court on the following case. It appeared in evidence on behalf of *Ravenstone* that *S. Hagg* died within two hours after she was delivered of the child. That she had previously been examined before a justice, according to 6 G. 2. c. 31. and her examination was produced, in which she deposed that the said *W. Start* was the father of the child. When this examination was offered in evidence, it was objected to on the behalf of *W. Start*, both as inadmissible and insufficient; the court received it in evidence, but thought that the woman being dead, no order of filiation could be made.—*Per curiam*: It is clear from the concluding part of the case that the only doubt entertained at the sessions was, whether or not they could make an order of filiation, the woman being dead, and not whether the evidence was sufficient to make an order on the party before them, if under these circumstances they could make an order at all; and as to the question reserved for the opinion of this court, there is no doubt but that they may proceed to make the order, altho' the woman be dead. The examination having been taken before a magistrate in the course of a judicial proceeding, under the 6 G. 2. c. 31. is certainly admissible evidence, like the depositions taken under 1 and 2 P. & M. c. 13. and being admissible, and not contradicted by any other evidence, it seems to be conclusive. We cannot indeed compel the justices at the sessions to decide on

Mother dying
before the order
is made.

the weight of evidence; but when we determine that this evidence is admissible in point of law, and that the justices may make the order applied for, though the woman be dead, we have no doubt but that they will also be of opinion that this evidence is conclusive against the party against whom the application has been made. *Per curiam*: Case to be sent back to the sessions. *Durnf. and East*, 5 V. 373.

Whether the
reputed father
may take the
child,

With the payment of money weekly, or other sustentation That is, to the overseers for the use of such child. But whether the overseers shall have the sole application of the money; and ordering of such child, or the reputed father may take the child from the parish, and provide for it himself, hath been doubted, and seemeth not yet to have been fully settled by the unanimous resolution of the court. And there are difficulties on both sides. If the reputed father indemnifies the parish, the intention of the act seemeth to be answered; and there may be supposed something of natural affection, (especially if he acknowledges the child to be his,) inclining him to be regardful of the child's welfare; at least more than can be reasonably expected from parish officers. But then; to be allowed to take the child from its mother, with whom the parish officers usually and very properly leave it, whilst very young, is unnatural and cruel; and it is very rare, that the reputed father ingenuously owns himself to be the real father. But if the child is of age and ability to be an apprentice or servant, and the reputed father can find a proper master, it is fit that he should have power to put out the child accordingly, or that his contribution to the parish from that time should cease.

In the case of *Richards* and *Samon* against *Hodges*, T. 2 Ch. 2. this point came in question, but the matter went off on an error in the proceedings; which was thus: *Richards* and *Samon*, being churchwardens, brought an action against *Hodges*, on his bond in the usual form to indemnify the parish in the case of a bastard child. The defendant pleaded *Non damnificatus* generally. The plaintiffs replied, that neither the defendant nor any other, did provide any maintenance for the child; by reason whereof, the parishioners, to prevent the said child's perishing by hunger and cold, were forced for all the time aforesaid to pay, and have paid 4 s. for the maintenance and nourishment of the said child. To which the defendant rejoined, that he would have nourished the said child

at his proper costs and charges for all the time aforesaid, and offered so to do, as well to the plaintiffs as to other the parishioners, but they refused to permit him, and of their own wrong, and against the will of the defendant, put the said child to nurse, and paid the said 4 s. Upon which rejoinder, the plaintiffs demurred in law. And by the court, the rejoinder is not good, because it is a departure from the first plea in bar; for the defendant in his plea says, that the parishioners were not damnified, and when the plaintiffs by their replication shew how they were damnified, there the defendant cannot rejoin that this damnification was of their own wrong, as here he hath done, but he ought to have pleaded that at first in his plea in bar. And though it was urged for the defendant, that this was no damnification at all, because it was the voluntary act of the parish to put the child to nurse when the defendant himself offered to maintain it, and that they ought not to take advantage of their own wrong; yet it was not allowed: For the court held clearly, that the rejoinder was a departure; and for that reason, it was adjudged for the plaintiffs. 2 *Saunders*, 83.

M. 21 Cba. 2. Burwell's case. Two justices order the reputed father to pay so much a week to the parish, until the child should be 12 years of age. This was held by the court to be wrong; and the reason given was, because the father might take it away when he pleased; and therefore the order ought to have been, that he should pay so long as the child should be chargeable to the parish. 1 *Ventr.* 48.

E. 24 Cba. 2. Sherman's case. An order was made, that the father should pay so much a week, till the child should be able to get its living by working. It was said by *Twisden* this order could not be good; for perhaps the father would take it away and maintain it himself, which he may do if he pleaseth. 1 *Ventr.* 210.

E. 11 Ann. Q. and Smith. Order to pay 1s. a week till the child is 8 years old. It was objected, that it should be so long as the child is chargeable; possibly he may gain a settlement; or a person may give him an estate; or the father may take him. By the court: This is only a remote possibility. As to the father's taking him, he ought to have done it at first; and by suffering the order to be made, it shall be deemed a refusal in law; besides, he shall not then be suffered; he may sell him, or make away with him, as too often happens. *Cas. of S.* 64.

Bastards.

T. 27 G. 2. Newland and Osman. Debt upon a bond; with a condition to indemnify and save harmless the parish of *Elting* from a bastard child. Plea; that the defendant had maintained, supported, and nourished the said child to a certain day, that is to say, to the 27th of *October* last, and that then he offered to take the said child to maintain, which they refused, and that if the church-wardens or any of them have been damnified, it is of their own wrong. Replication; that for three weeks from and after the said 27th day of *October*, the defendant did not provide nourishment for the child, but failed, and by reason thereof the plaintiffs, after the three weeks, expended 3s. for the maintenance of the child, and so were damnified. Demurrer; and joinder in demurrer. The question of law is, Whether a putative father may take a bastard child into his own custody to maintain it, or whether the parish shall have the care of it. And the case in 2 *Saund.* 83. (a) was mentioned, wherein the court held this to be a good plea. 1 *Vent.* 48. (b) That the father may maintain the child himself. 1 *Ventr.* 210. (c) That the justices can only make an order to maintain, so long as the child shall be chargeable.—By *Lee Ch. J.* The right way is, to make the order, so long as the child shall be chargeable. It is not to be limited to any certain time. And the reason given in all these cases is, that the father or mother may take it before the time. The intention of the statute of *Elizabeth* was, to have a provision for the bastard, and at the same time to indemnify parishes. And the law could never think of taking the care and education of children from their parents. Nor could this enter into the mind of any judge. Nourishing and maintaining certainly answers education. It hath been objected, that the excuse is collateral: I do not think so; for all the inhabitants are parties, and the overseers are but trustees for them. It seems a sufficient excuse; and there is no answer on the part of the plaintiff to it. No objection has ever been thought of to pleas of this kind: — *Wright J.* in the case in *Saunders*, it seems to have been admitted, that if this had been pleaded in the first instance, it would have been good. I never did hear before, that the care of the child devolved upon the parish, where there was any other person to take care of it. They are obliged to maintain the child, where it is in danger of starving. This court has constantly held, that

(a) Above.

(b) Above.

(c) Above.

the

the father has a right to take it away, by quashing the orders made in manner above mentioned. This is not a collateral excuse; but such an one as will save the penalty. And I cannot see that the parish has any sort of right or interest in the child. — *Dennison J.* The material objection taken to this plea is, Whether or no the putative father of a bastard child can by the law of *England* take his bastard child from the parish. I never did hear this doubted before. And I think that the notion that he cannot, is not to be countenanced nor encouraged. The law does not suppose, that a man will not maintain his own child. It is said, the next heir is not to be trusted with the guardianship. I am sorry that it was ever introduced into the law of *England*. It is an injurious notion of the people of *England*. I will rather suppose, that the parish officers will be cruel to the child, than the father. All the cases admit tacitly that the father hath such a power. And some of them say so expressly. And I am very well satisfied that the law is so. Inhabitants, churchwardens, overseers, are all the same; and every part of the condition is answered. I have known this plea very often pleaded. And that case in *Saunders* is the rule. — *Foster J.* I am not so clear in these points. I think the care of educating bastard children, is not to be considered as a burden on the parish, but as a trust; and that it should not be so easy for fathers to take them out of their care and custody. The statute is express, that the justices shall order the father to contribute to the parish for the maintenance of the child. Tho' it is not to be supposed that fathers will destroy their bastard children, yet they may look upon them as a burden and a shame, and therefore either neglect them, or put them into improper hands. The resolutions and orders of justices of the peace have been grounded upon this; not for requiring security till the child came to a certain age, but because the order intended the age too far. Therefore I am not so clear. The case in *Saunders* was only his own opinion — Judgment for the defendant, unless desired to be argued again this term. (This was at the desire of the plaintiff's counsel.) MS.

And, in the case of *Hulland* against *Malten* and *Brifew*, T. 33 & 34 G. 2. In the common pleas. (Which was on a suit upon a bond for indemnifying the plaintiff from the charges of a bastard child, but it went off upon an error in the pleadings.) The court said, we need not in this case say, whether the father or the mother hath a right

right to have the child while under seven years of age. And by the L. Ch. J. *Wilmot*: I give no opinion, whether the father has any power over the child, who is *nullius filius*. *Grotius* says truly, the mother is the only certain parent. And an order of justices to remove the mother always removes the child. 2 *Wilson*, 126.

But in the case of *K. v. Soper*. E. 33 G. 3. A child of three years of age being brought up at the instance of its mother, on an *babeas corpus*, by the putative father, on whom an order of filiation had been made, and who had obtained the possession of the child by fraud:—*Burrough* objected to the child being restored to the mother, on the ground that, as the child had been adjudged to be the child of *Soper*, he had a right to the custody of it. But L. *Kenyon* Ch. J. (stopping *Garrow*, &c. *contra*) said, that the putative father had no right to the custody of the child; and it was accordingly restored to the mother. *Durnf. and East*, 5 V. 278.

Upon the whole, there are two considerations, which seem to reduce the unlimited power in several of the aforesaid cases, of the reputed father taking the child when he pleases, into a very narrow compass. One is, that nothing is more established, than that a child shall not be taken from its mother, without her consent, before it is seven years of age. The other is, That an order made by the justices, and confirmed at the sessions, or not appealed against, is binding upon the reputed father; and no other justices, in or out of sessions, have power to intermeddle: And so it is laid down in one of the aforesaid cases, that “if the father take the child he must do it at first; and by suffering the order to be made, it shall be deemed a refusal in law; and he shall not then be suffered, he may sell it or make away with it, as too often happens.” So that it should seem upon these premises, that the time for the reputed father to insist upon taking the child cannot be until after it is seven years of age; nor even then, if an order has been made, and it is not to be supposed that the parish officers will forbear for seven years applying for an order, only to give the reputed father an opportunity to put in his claim.

After all: Whatever exalted notions speculative and humane persons may entertain of the dignity of human nature and the tenderness of parents towards their children, it seemeth that large abatements ought to be made in respect of that kind of parents here spoken of. In practice it is seldom, if ever, known, that a reputed father who

applies to have the child taken off from the parish into his own management, even so much as pretends any advantage to the child thereby, but merely his own interest, to save charges. He does not want to have the child better provided for, but cheaper. If he should offer any thing for the good of the child, whereby he himself would not receive any benefit, much more if attended with some small additional expence to him, there is no doubt but the parish would be willing enough to accede to his proposal. And it is well known in fact, that where the reputed father openly acknowledges the child, and is a man of some substance, so as not to be likely to run away, the parish seldom gives him any disturbance; or if they be applied to in behalf of the child, they are for the most part ready to join with him in any reasonable accommodation.

Such party so making default in not performing the said order, to be committed] Until default shall be made, the justices have no power to commit, or to require sureties for performance of the order, or for appearing at the sessions. *L. Raym. 858. 3 Salk. 66. 1 Barnardist. 261.*

And hereby a passage might be left open to avoid the future payments, by the reputed father complying at present, and afterwards running away. But the aforesaid statute of the 6 G. 2. c. 31. seemeth to have been intended to remedy this inconvenience; by which one or more justices, either before or after the birth, may commit him to the gaol or house of correction, unless he shall give security to indemnify the parish, or otherwise enter into recognizance to abide such order or orders as shall be made in pursuance of the act of the 18 El.

To be committed to ward to the common gaol] In the aforesaid case of *Eilen Bent*, the justices had committed her to the house of correction. It was objected that the statute gives no power to do this; but the commitment, if any, ought to have been to the common gaol. But that was held by the court to be well enough. For the statute of the 7 J. c. 4. gives power to commit such lewd women to the house of correction. And by the 6 G. c. 19. a general power is given, for small offences, or for want of sureties, to commit either to the gaol or house of correction. *Burr. Mansf. 1681.*

Except he shall put in sufficient surety to perform the said order] That is, by recognizance; which, if the order is disobeyed, shall be forfeited, and estreated into the exchequer. But this makes nothing for the relief of the parish. And therefore it were better if such recognizance,

or

or other security, upon default, might be made assignable to the parish officers; or else, that the person not paying, as well as not giving security, might be committed till payment should be made. Or if no security is given, it seemeth that the prisoner, disobeying the order, may be indicted, fined, and imprisoned for the contempt.——If the orders are removed into the king's bench, and there confirmed; the court, on non-performance, will grant an attachment.

In what case an action may be brought by the woman's father.

It frequently happens, that the reputed father, by giving bond to indemnify the parish, escapes paying any thing towards the maintenance of the child, unless the mother, with her child, will throw herself upon the parish, which sometimes perhaps her ability will not permit, or otherwise she disdains to do. In such case it hath been advised sometimes, for the woman's father to bring an action against the man for special damage sustained by the loss of his daughter's service; and a jury, according to circumstances, will give reasonable compensation.——That is, if she be not emancipated from the father; or be, at the time, a part of her father's family and in his service. As in the following cases:

E. 6 G. 3. Pofflethwaite and Parkes. This was an action of trespass with force and arms, for an assault upon the plaintiff's daughter, and getting her with child: And the declaration concluded, *whereby he lost her service.* It was tried at the assizes before Mr. J. Baiburst, and a verdict given for the plaintiff, and 40s. damages. A special case was stated, to this effect: The plaintiff's daughter being 23 years of age, hired herself to one *Saul*, as a servant; and went to live with *Saul* her master, and served him some time. During her service, she was gotten with child by the defendant; and becoming big with child, and unable thereby to perform her service as she was used and ought to do, she was discharged by *Saul* her master, who paid her her wages in proportion to the service she had already done him; and the plaintiff her father received her, when no one else would, and lodged and boarded her in his house. She was there delivered of a bastard child; and the plaintiff, her father, maintained her in her lying-in, at his own expence. The question which arose at the trial, and which was reserved for the opinion of the court of king's bench, was, "Whether the plaintiff can maintain this action." In the argument of this cause two points were made, 1. Whether the father and daughter can be considered as master and servant.

2. Whether her age makes any difference in the case, as she was upwards of 21, namely 23 years of age.—Mr. *Davenport*, for the plaintiff, argued, That the action is maintainable by the father, upon the foot of being her master; as he has alledged, *whereby he lost her service*. He agreed, that no action would lie, but by reason of the loss of her service. Here, a daughter goes out to service, is gotten with child, discharged, and returned upon her father, helpless and unable, in that condition, to maintain herself. He is obliged by law to maintain her; and did so from the necessity of the thing. Therefore, from the consequential damage, an action is maintainable by her father, in whose house she resided: and where she must, in this case, be considered as a servant. And this case is not to be considered upon the foot of emancipation: Her being 23 years of age makes no difference. This young woman's master could not bring an action against this defendant; he had sustained no damage, having discharged her as soon as she became unserviceable to him. No body but the father could sue. And the damage is the same to him, whether she be over or under 21.—Mr. *Wallace*, on the other side, argued for the defendant. The foundation of actions of this kind hath been, the *loss of service*. The father's interest in the child, whatever it might have been during infancy, ceases at the child's coming to the age of 21. Many injuries may be done to a child, which are not the subjects of actions by the father. Indeed an action will lie by a father for taking away his son or his daughter, and there is a writ provided for him in the register for that purpose. But no action will lie for debauching his daughter. If the father maintains the daughter in his own house, he is entitled to her service, and may maintain an action for the loss of her service. But here, she was hired out to service in another man's house. If she had been under age, and under her father's roof, I would agree that he had been entitled to an action as for the loss of service. No instance can be produced, no precedent of such an action as this is. And the principle will not hold; because it depends upon the loss of service, which was not the present case.—Upon the whole it appeared that the parties were poor. The court therefore proposed a compromise; which was accepted: namely, that all proceedings be stayed without costs on either side. L. *Manfield* added, that it was not upon any doubt in point of law that he proposed the compromise: meaning, as it seemeth, that he was clear that the action in this case would not lie. And upon that supposition, the reporter says

says he has ventured to report it, tho' it was not determined judicially and in form. However, he says, there can be no doubt, but that the court were all of opinion, that the action could not be maintained: And therefore, in compassion to the plaintiff, whose daughter had been injured by the defendant, they wished to save him from the payment of costs. *Burr. Mansf.* 1878.

E. 9 G. 3. Tullidge and Wade. In the common pleas. An action of trespass was brought against the defendant, for that he with force and arms made an assault upon the daughter and servant of the plaintiff, and got her with child, whereby he lost the benefit of her service for a certain space of time, and was put to great charge and expence in her time of lying-in. The defendant pleaded not guilty. The cause was tried at the assizes before Mr. Justice Gould; when the jury found a verdict for the plaintiff, and gave him 50 l. damages. It was moved for a new trial; and the motion was grounded upon an affidavit tending to shew, that under the circumstances of the case appearing at the trial, the damages were excessive; and also, that evidence was given at the trial, of a promise of marriage made by the defendant to the woman, which ought not to have been permitted, because she may have another sort of action upon that promise. Whereupon Mr. Justice Gould made his report to the court: And after stating the declaration as above, he said, that this daughter of the plaintiff was called as a witness at the trial, and swore, that the plaintiff her father was a maltster, and kept a public house; that she was his servant, and was about 30 years of age; that the defendant was an exciseman, made his addresses to her as a lover, with an intention (as she then thought) to marry her; that he was well received on that account by the plaintiff her father, and very civilly treated by him and his family, and often spent the evening with them: She also swore, that he promised her marriage, and got her with child. Her brother also was called, who deposed, that the plaintiff was wholly deprived of his said daughter's service and assistance in his business, and paid some money on account of her lying-in. The counsel for the defendant, at the trial, objected to the evidence given, as to the promise of marriage. Upon which, she offered to give the defendant a release as to that promise; but the counsel for the defendant refused to accept thereof. Upon summing up the evidence to the jury, the judge told them (as he was pleased to say) over and over again, that in giving damages
in

in this action, they must not consider the injury done to the woman as to the promise of marriage, but must leave that matter quite out of the question, because she might have her action for breach of that promise; that he thought the plaintiff her father was by nature bound to take care of her while she laid-in, and that they should consider his expences on that account, as well as his loss of his daughter's service. Whereupon the jury gave 50*l.* damages, with which the judge said he was not at all dissatisfied; and that he thought, if the jury had then considered the promise of marriage, they would have given six times as much damages.—By the L. Ch. J. *Wilmet*: Actions of this sort are brought for example's sake. And although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages. And if the daughter brings another action against the defendant for the breach of promise of marriage, so much the better: he ought to be punished both ways. Her being of the age of 30, is nothing to mitigate damages, or lessen the defendant's fault. And we will pay no regard to any affidavit read to us, the judge who tried the cause being satisfied with the verdict. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to make his addresses to his daughter.—And the motion for a new trial was rejected, and the plaintiff had judgment by the whole court. 3 *Wilson*, 18.

Also in the case of *Weldon v. Timbrell*, T. 33 G. 3. It was said by the court, that however a parent may feel for the violation of his daughter's chastity, it is clear that no action can be maintained, unless some evidence be given that the daughter performed some acts of service for the father; very slight evidence indeed is sufficient, but still it is necessary to give some. *Durnf. and East*, 5 V. 357.

I. The usual approved form of the order of filiation and maintenance is as follows:

Westmorland. **T**HE order of J. P. and K. P. esquires,
two of his majesty's justices of the peace
in and for the said county, one whereof is of the quorum, and
both residing [in, or] next unto the limits of the parish church
within the parish of ——— in the said county, made the ———
Vol. I. R day

Bastards.

day of — in the — year — concerning a (male) bastard child, lately born in the parish of — aforesaid, of the body of A. M. singlewoman :

Whereas it hath appeared unto us the said justices, as well upon the complaint of the churchwardens and overseers of the poor of the said parish of — as upon the oath of the said A. M. that she the said A. M. on the — day of — now last past, was delivered of a (male) bastard child at — in the parish of — in the said county, and that the said bastard child is now chargeable to the said parish of — and likely so to continue ; and further that A. F. of — in the said county, yeoman, did beget the said bastard child on the body of her the said A. M. And whereas the said A. F. hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause why he the said A. F. shall not be the reputed father of the said bastard child : [Or, And whereas it hath been duly proved to us upon oath, that the said A. F. hath been duly summoned to appear before us the said justices, to the end we might examine into the cause and circumstance of the premises ; and whereas he the said A. F. hath neglected to appear before us, according to the said summons :] We therefore, upon examination of the cause and circumstance of the premises, as well upon the oath of the said A. M. as otherwise, do hereby adjudge him the said A. F. to be the reputed father of the said bastard child.

And thereupon we do order, as well for the better relief of the said parish of — as for the sustentation and relief of the said bastard child, that the said A. F. shall and do forthwith, upon notice of this our order, pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of — or to some or one of them, the sum of — for and towards the lying-in of the said A. M. and the maintenance of the said bastard child, to the time of making this our order.

And we do also hereby further order, that the said A. F. shall likewise pay or cause to be paid to the churchwardens and overseers of the poor of the said parish of — for the time being, or to some or one of them, the sum of — weekly and every week from this present time, for and towards the keeping, sustentation, and maintenance of the said bastard child, for and during so long time as the said bastard child shall be chargeable to the said parish of —

And we do further order, that the said A. M. shall also pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of — for the time being, or to some or one of them, the sum of — weekly and every week, so

As long as the said bastard child shall be chargeable to the said parish of _____ in case she shall not nurse and take care of the said child herself.

Given under our hands and seals the day and year first above written.

One whereof is of the quorum] Many orders formerly have been quashed, for want of setting forth that one of the justices was of the *quorum*; but now by the statute of 26 G. 2. c. 27. no order shall be quashed for that defect only.

Whereas it hath appeared unto us] *K. and Beard.* The examination of the woman must be by two justices, as well as the ordering part: for the examination is a judicial act, and ought to be by both; and it is not enough that one should examine, and make report to the other; but if they are both present, and one only examine, it is well enough, for it is in fact the examination of both. 2 Salk. 478.

Whereas two or more justices are required to do any judicial act, they ought to be together.

So in the case of *Billings* against *Prinn* and *Delabere*, esquires, T. 15 G. 3. An action of trespass and false imprisonment was brought by the plaintiff, for committing her to prison for refusing to filiate a bastard child. She was examined severally, at separate times (but in the same day), and in separate places, by the two justices the defendants, and they separately signed the warrant of commitment. On trial at the assizes, a verdict was given for the plaintiff, with 5l. damages. It was moved for a new trial, and argued, that it was sufficient under the statute, if the two justices joined in and consented to the commitment, but that they might examine and adjudge the matter, and sign the warrant, separately. Unto which it was answered, that where two or more are required to do any act, they must meet together: Else what they resolve on is the mind of individuals, not of the whole body. And this hath always been the doctrine with respect to justices of the peace. By the court: This case is so clear, that it cannot bear an argument. There is no use in appointing two or more persons to exercise judicial powers, unless they are to act together. Separate examinations by different magistrates may produce different facts. On which then is the adjudication to proceed? It is exceeding clear, that in case of an action thus brought to try the validity of the commitment, it cannot be supported by law. *Black. Rep.* 1017.

As well upon the complaint of the churchwardens and overseers] It hath been said that an order made without the
Complaint.

Bastards.

complaint of the parish officers, is not good. *Blackety*, 44.

But in the case of *K. and Buckall*, *M. 3 G. 2.* where it was objected, that the order did not appear to be made upon complaint of the parish; it was answered, that the statute does not require that the parish should complain, but gives the justices power to make such order on the complaint of any other. And the order, as to that part, was confirmed. 1 *Barnardist.* 261.

Mother to be
examined on
oath.

As upon the oath of the said A. M.] It seemeth, that the mother may be examined upon oath, concerning the reputed father, and of the time and other circumstances; for that in this case, the matter, and the trial thereof, dependeth chiefly upon the examination and testimony of the mother. *Dalt. c. 11.*

The sex to be
set forth.

Was delivered of a (male) bastard child] *H. 8 G. K. and England.* An order was quashed, because the sex of the bastard, or the name of it were not mentioned; only, a certain bastard child born of the body of such a woman. *Str. 503.*

And the parish
where born.

At ——— in the said parish of ———] *M. 11 Ann. Q. and Casb.* The order did not set forth that the child was born in the parish; and by the statute the justices cannot make an order to compel a man to contribute towards the maintenance of a bastard child, but in case of that parish where the child was born: And quashed for this reason. *Casb. of S. 59. Cald. Casb. 173.*

T. 7 G. K. and Butcher. Exception was taken to an order of bastardy, that it did not appear the child was born in the parish to which the relief is ordered; for it ran; *We two justices of the borough of Lime Regis, residing within the limits where the parish church is, within which parish the child was born* ——— Which is only an averment, that the justices resided in that parish where the child was born, but that might not be the same parish ordered to be relieved. And for this fault the order was quashed. *Str. 437.*

E. 3 G. 2. K. and Childers. On a rule to shew cause, why an order of two justices for relief of a bastard child, and an order of sessions confirming the same, should not be quashed; it was objected, that it was not directly adjudged that the child was born in the parish (of *Staplebury*), and yet the order requires the defendant to pay the sum of 45 s. to the churchwardens of that parish to reimburse them. It was answered, that it doth sufficiently appear in the order, that the child was born there; for it adjudges, that the defendant should pay this sum, for the charges

charges the parish of *Staplehurst* were at upon account of the woman's lying in there. But the court said, that they do not allow of inferences to give the justices jurisdiction; and accordingly quashed both the orders. *1 Barnardist. 326.*

E. 10 G. 2. K. and Greaves. The parish where the child is born, is only to be indemnified; and if the bastard has acquired a settlement elsewhere, the father is then discharged. *Nelf. Bast.*

And in the case of *K. v. Stanley, E. 22 G. 3.* Objection was taken to an order of bastardy, made upon one *Thomas Stanley*, adjudging him to be the reputed father of a bastard child. On which order being removed by *certiorari* it appeared, that there was no adjudication that the child was born in the parish charged with its maintenance, nothing more being stated, than that it was chargeable to the parish, and likely so to continue.—By the court: Order quashed. *Cald. Caf. 172.*

Chargeable to the said parish] Order to provide for a bastard child: Exception was taken, that the order doth not set forth that he is chargeable to the parish, or likely to be so. And quashed by the court. *Comb. 39.*

But in *K. and Matthews, H. 8 W.* Exception was taken, that the order doth not set forth that the child is likely to become chargeable. But this exception was over-ruled; for that it is self-evident that every bastard child is likely to become chargeable. *2 Salk. 475, 6.*

And further, that A. F. of — in the said county, yeoman, did beget the said bastard child] *T. 2 G. 2. K. and Browne.* Upon an order of bastardy it was stated, that the husband had been absent six years, and that during his absence the defendant had carnal knowledge of the wife, and therefore they adjudge him to be the putative father. But by the court, This order must be quashed; for his lying with her is not a sufficient reason to infer him the father of this child: and tho' the justices need not shew the grounds they go upon, yet if they do, and it appears no sufficient ground, their order will be bad. *Str. 811.*

Husband being absent, proof of carnal knowledge not sufficient.

And whereas the said A. F. hath appeared before us] In the case of *K. v. Upton Gray, T. 23 G. 3. Walker Nation* was adjudged to be the reputed father of a bastard child begotten on *Sarah Arundall*, which was chargeable to the said parish of *Upton Gray*, and was ordered to pay 1s. weekly, &c. The lessions on appeal quashed the order, it not appearing upon the face of the order, that the said *Sarah Arundall* was examined in the presence of the said *Walter Nation* at the time of making the said order.—By L.

Whether the mother need be examined in the presence of the reputed father.

Mansfield, and the court, The presence of the putative father is not necessary before the justices out of the sessions; and as the sessions have stated this and no other to have been the foundation of their proceedings, we cannot presume that they went upon any other.—Order of sessions quashed, and the original order affirmed. *Cald. Caf.* 308.

Order must adjudge the person charged, to be the reputed father,

Do hereby adjudge] *T. 4 Ann. Q. and Weston.* The great objection which stuck long with the court, was, that it was said in the order, we the said justices *doth* adjudge, instead of *do* adjudge; and after the case had depended two terms, and been several times stirred, the court for that exception, the last day of the term, quashed the order. *L. Raym.* 1198.

And afterwards, *H. 4 Ann.* The same justices made another order with the very same fault in it, *viz. doth* adjudge; and upon a certiorari, that was quashed. *L. Raym.* 1198.

Adjudge the said A. F. to be the reputed father] *E. 20 C. 2. K. and Perkess.* An order was quashed, because there was no adjudication, that the person against whom the complaint was made, was the reputed father. *2 Sid.* 363.

H. 9 G. 2. K. and Jenkins. Motion to quash an order of two justices, whereby they adjudge, that such a person is *not* the putative father of a bastard child, and therefore they discharge him; and the rather, because in such a case the parish cannot appeal, because an appeal is only, when the party refuses to give security to come to sessions. And by the whole court, the two justices have no such authority: for their whole power depends on the statute of 18 *Eliz.* and that is only to take order for punishment of the parties, and for relief of the parish, and this order is for neither the one nor the other. *2 Sess. C.* 161. *Sir.* 1050.

A gross sum may be ordered for defraying expenses then incurred.

The sum of — for and towards the lying-in] *M. 12 Ann. Q. and Odam.* Order for maintenance of a bastard child, was excepted to, because the defendant is upon sight of the order to pay 9l. in gross; and after that, so much weekly. Aird by the court: By the statute the justices are to take order for relief of the parish, and keeping of the child, by payment of money weekly, or other sustentation; and this may be only indemnifying the parish for money laid out before the reputed father was found. *1 Salk.* 124.

How long such payments shall continue.

During so long time as the said bastard child shall be chargeable] *E. 9 W. K. and Barebaker.* An order to pay so much money by the week, till the child shall be fourteen years of

of age, was adjudged to be bad : for the justices have no power but to indemnify the parish ; and that is only to oblige him to maintain the child, as long as it is or may be chargeable. 1 *Salk.* 121. 2 *Salk.* 478.

An order that the putative father should pay so much a week, until it should be able to get its living by working, was quashed ; it should have been for so long time as the child was chargeable to the parish. 1 *Vent.* 210.

But in the case, of *K. and Street, M.* 1 *G.* 2. An order of bastardy was made, to pay so much weekly, till the child was nine years old, if it should so long live. And by the court, it is a good order, for we cannot intend it able to provide for itself sooner. *Str.* 788.

So in the case of *K. and Buckall, M.* 1 *G.* 2. Exception was taken, that the order appointed the sum of 2s. to be paid weekly, till the child should come to the age of twelve years, without saving, if the child shall be so long chargeable to the parish. It was answered, that indeed the old authorities lay it down in general, that orders of bastardy, as well as other orders relating to the poor, must be under the limitation mentioned ; but the later authorities have been, that orders of bastardy need not : and this, it was said, is founded upon good reason ; for there cannot be any reasonable intendment, that bastards, who have no kindred, will have provision from any body, till such an age as is mentioned in the order. And of that opinion was the court, and confirmed the order as to that point. 1 *Barnardist.* 261.

But then the child may be bound an apprentice into another parish before that age ; and having gained a settlement in such other parish, the effect of the order should then cease. Therefore it is best in this and all such like cases to hold to the statute : and the statute here only gives power to the justices *to take order for the relief of the parish where the child shall be born.*

In *Browne's case, T.* 9 *W.* it was said, the justices cannot order a sum, for putting out the child an apprentice : *Comb.* 448.

But in the aforesaid case of *K. and Buckall, M.* 3 *G.* 2. Where it was objected, that the order was for the reputed father to pay 4l. to the overseers for binding the child out apprentice, when it should come to the age of 12 years ; and did not say, if the child shall want it ; so that tho' the child should be provided for in any other way, the sum must be still paid to the overseers : The objection was

over-ruled by the court; and the order, as to that, held good. 1 *Barnardist*. 261.

But it seemeth not necessary to incumber the order therewith; for it may be the same thing if the parish bind him out, and pay the money; for until such sum shall be run off by the weekly payments, so long the child continues chargeable.

Errors in form
may be amend-
ed.

BUT after all, so far as these errors above rehearsed shall affect only the *form* of the order, and not the *merits* thereof, the same may be amended at the sessions; by the 5 G. 2. c. 19. before the appeal shall be proceeded upon, and then the court shall go upon the merits.

V. Appeal against the order.

By the aforelaid statute of the 18 El. c. 3. the mother or reputed father refusing to perform the order of the two justices, shall be committed, unless they shall put in sufficient surety to perform the said order, or else *personally* to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken; and also to abide such order, as the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any); and that if at the said sessions, the said justices shall take no other order, then to abide and perform the order before made, as is above said.

Defendant per-
sonally to ap-
pear.

Personally to appear] H. 8 W. K. and Matthew. It was moved to quash an order for maintaining a bastard child. It was answered, that no order relating to a bastard child can be quashed, unless the reputed father be present in court. Unto which the court assented. But it appearing to be a hard case, a rule was made to shew cause. On shewing cause, it was quashed; but the court would not quash it, till the reputed father came into court. 2 *Salk*. 475.

H. 33 G. 2. K. and Gibson. It was moved to quash an order of bastardy; which, being indefensible, was accordingly done; the defendant entering into recognizance to abide the order of the sessions below: which was the reason (the court said) why a personal appearance of the defendant was in these cases always required. *Black. Rep.* 18.

What shall be
deemed the next
sessions.

At the next general sessions] That is to say, the next general sessions after notice of such order. 3 *Keb.* 551.

General sessions] T. 10 W. K. and Shaw. An order was made by two justices, adjudging Shaw to be the reputed father of a bastard; whereupon he appealed to the next quarter sessions after notice; where the order of the two justices was discharged: And now it was moved to quash the order of sessions, because by the statute the appeal must be to the next general sessions, and there might have been a general sessions before the general quarter sessions, as in London or Middlesex, where there are four general sessions in the year, besides the quarter sessions. And quashed for this fault. 2 Salk. 481.

But in the case of *K. v. Chichester*, M. 30 G. 3. An order was made by two justices on the 27th March, 1789, adjudging James Lover to be the reputed father of a bastard child; against which he appealed to the general quarter sessions held on the 22d April, where it was quashed; and no case was reserved for the opinion of this court. But both the orders being now returned by certiorari;—*Erskine* moved to quash the order of sessions, because that court had no jurisdiction to hear the appeal, as a court of general sessions might have intervened between the 27th March and the 22d April. And he relied on the case of *K. v. Shaw*, as in point.—*L. Kenyon* Ch. J. (*Stopping Mingay* on the other side) observed that the case cited did not appear to be one of the most authentic in *Salkeld's Reports*. But it is a general rule that every intendment shall be made to support an order of justices; and as it does not appear that the general quarter sessions held on the 22d of April were not the sessions next following the 27th of March, we will not presume it for the purpose of quashing the order of sessions. Order of sessions affirmed. *Durnf. and East*, 3 V. 496.

To be holden in that county] It was moved to quash an order, for that it was at the sessions of the peace in the county aforesaid, and did not say for the county; but this was over-ruled, for that there is not so much strictness required in orders, as there is in indictments. 1 Ventr. 37.

To which may be added also, that this is according to the words of the statute.

In that county where such order shall be taken] T. 15 C. 2. *K. and Coyston*. Resolved, that this shall be intended of the next sessions of that part of the county where it was made, and not at the next sessions in any county at large; for that would be mischievous in many counties, where

In that part of
the county
where made.

Order either
quashed or con-
firmed upon the
merits, is con-
clusive.

where there are several sessions in distinct parts of the county. 1 Sid. 149.

To abide such order as the said justices, or the more part of them, shall then and there take] M. 13 G. K. and Tenant. The order of two justices being quashed upon the merits by the sessions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in question again for the same fact. L. Raym. 1423, 4. Str. 716.

If the two next justices make an order, and the party appeals to the next sessions, and they alter or discharge (upon the merits,) or confirm that order; no other sessions can order any thing contrary thereto, for the order upon the appeal is final. Cro. Car. 350.

T. 1 G. 2. K. and Arundell. Two justices make an order, that the defendant shall pay a sum in gross, and also 2s. a week so long as the child shall be chargeable. The party appeals to the sessions, who confirm the order. At a subsequent sessions, the father of the bastard desired to have the keeping of it, and that the payment of the 2s. a week should cease; which the second sessions ordered. Motion was made to quash this last order of sessions, because in this case they had no jurisdiction. And the court held, that the second sessions had no authority to order the subtraction of the 2s. a week; and the order was quashed, because it was made out of time (being three years after the appeal), and therefore the justices had no jurisdiction. 1 Sess. C. 234.

But not if
quashed for want
of form.

But if the order be quashed for want of form, it is as no order at all; and therefore the justices may proceed *de novo*. Or the sessions may amend the order before they proceed, as above set forth.

VI. Punishment of the mother and reputed father.

By the 18 El. c. 3. Concerning bastards being left to be kept at the charges of the parish where born, to the great burden thereof, and to the evil example and encouragement of lewd life, it is enacted, that the two next justices shall take order therein, as well for the punishment of the mother and reputed father, as for the relief of the parish.

And by 7 J. c. 4. Every lewd woman which shall have any bastard which may be chargeable to the parish, the justices of the peace shall commit (M. N.) such lewd woman to the house of correction, there to be punished and set on work, during the term of one whole year; and if she shall afterwards offend again, then to be committed to the said house of correction as aforesaid, and

and there to remain until she can put in good sureties for her good behaviour, not to offend so again. s. 7.

Bastard which may be chargeable] It seemeth by these words, that such woman shall not be sent to the house of correction, until after the child be born, and that it be living: for it must be such a child as may be chargeable to the parish. *Dalt. c. 11.*

Child must be living and chargeable.

And if she will discharge the parish of keeping the bastard, she cannot be punished by the statute of 7 J.

But nevertheless she may be punished (*L. Coke* says) by the statute of 18 *El.* 2 *Inst.* 733.

Which opinion seems justly questionable: for the preamble of the said act of 18 *El.* (as hath been rehearsed) seemeth to restrain the jurisdiction of the justices to the parents of such bastard children only as are left to be kept at the charges of the parish where born.

The justices of the peace shall commit] It seemeth that such commitment ought to be by two justices at the least; and by comparing the two statutes together, it seemeth fittest for the two next justices authorised by the 18 *El.* *Dalt. c. 11.*

Commitment to be by a justice.

Shall commit such lewd woman] But such punishment shall not be until after the woman is delivered of her child; neither are the justices to meddle with a woman until the child be born, and she strong again. *Dalt. c. 11.*

Whether the child may be committed with the mother.

Also it seemeth, that such bastard child is not to be sent with the mother to the house of correction, but rather that the child should remain in the town where it was born (or settled with the mother), and there to be relieved by the work of the mother, or by relief from the reputed father; and yet the common opinion and practice is otherwise, viz. to send the child with the mother to the house of correction; and this may also seem reasonable, where the child sucketh on the mother. *Id.*

But it seemeth much the best, to commit the mother only, and not the child, but leave it to her choice whether she will take it with her; and if she will not, then to send it to its lawful place of settlement.

Offend again, then to be committed to the said house of correction as aforesaid] Which words do imply that she shall not be punished as for a second offence, unless she hath been committed to and punished in the house of correction for the first.

Second offence.

VII. Mother or reputed father running away.

Their property
may be seized
and sold.

Whereas the putative fathers and lewd mothers of bastard children run away out of the parish, and sometimes out of the county, and leave the bastard children upon the charge of the parish where they are born, altho' they have estates sufficient to discharge the parish; it shall be lawful for the churchwardens and overseers of the poor of such parish where any bastard child shall be born, to take and seize (O) so much of the goods, and receive so much of the annual rents or profits of the lands of such putative father or lewd mother, as shall be ordered by any two justices, towards the discharge of the parish, to be confirmed at the sessions, for the bringing up and providing for such bastard child; and thereupon the sessions may make an order for the churchwardens or overseers of the poor of such parish, to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits of the lands, or so much of them as shall be so ordered by the sessions. 13 & 14 C. 2. c. 1. s. 19.

E. 2 Ann. 2. and Chaffey. Order to the churchwardens and overseers, to seize of the putative father's goods, what they should judge proper for securing of the parish, qualified; for that it should be, what the justices think proper, and not what the churchwardens and overseers think proper. L. Raym. 858.

VIII. Murdering a bastard child.

Concealing the
death of a bas-
tard child.

1. By the 21 J. c. 27. If any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness at least, that the child was born dead.

And it hath been adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only makes such concealment an undeniable evidence of murder. 2 Haw. 438.

Also

Also it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. *Id.*

But of late years, as this law seemeth to be somewhat severe, it hath been usual, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption is admitted, that because the death was concealed, therefore it was killed by its parent. 4 *Blackst.* 198.

Also, it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Haw.* 438.

Also, it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. *Id.*

2. If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 *H. H.* 429, 30.

Giving a potion
to cause abortion.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, nor can it legally be known, whether it were killed or not. 1 *H. H.* 433.

But if the child be born alive, and afterwards die of the poison or bruises it received in the womb; it is murder in such as administered or gave them. 1 *Haw.* 80. 4 *Blackst.* 198.

So if a man procure a woman with child to destroy her infant when born, and the child is born, and the woman in

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in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessory. 1 H. H. 433.

IX. Capacity of a bastard as to inheritance.

A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name of reputation, he may purchase by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 Inst. 3. 6 Co. 65.

A bastard is *terminus a quo*; he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother, or sister, or the like. 3 Salk. 66.

Consideration of natural affection will not raise an use to a bastard; for though there is natural affection between them, yet the raising the use is a constitution of the law, and therefore the use shall never arise. Jenk. 47. Dyer, 374.

If the issue of a man who is a bastard purchase land, and dies without issue; tho' the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother (being no bastard) it may; so if the bastard was attained: for the heirs of the part of the mother make not any conveyance by the bastard. Ney, 159.

If a bastard dies intestate, without wife or issue, the king is entitled to the *personalty*; and the ordinary of course grants administration to the patentee or grantee of the crown. 3 P. Will. 33. 2 Black. 505.

A. Voluntary examination of a woman with child of a bastard; by 6 G. 2. c. 31.

Westmorland. *THE* voluntary examination of A. M. of _____ in the said county, single woman, taken on oath, before me _____ one of his majesty's justices of the peace in and for the said county, this _____ day of _____.

Who saith, that she is now with child, and that the said child is likely to be born a bastard, and to be chargeable to the parish of _____ in the said county, and that A. F. of _____ in

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_____ in the said county, weaver, is the father of the said child.

Taken and signed the day and year
above written, before me

The mark of
† A. M.

J. P.

Examination after the birth.

Westmorland. *THE examination of A. M. of _____ in the said county, singlewoman, taken upon oath before me _____ one of his majesty's justices of the peace in and for the said county, this _____ day of _____.*

Who saith, that on _____ the _____ day of _____ now last past, at _____ in the parish of _____ in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of _____; and that A. F. of _____ in the said county, weaver, did get her with child of the said bastard child.

Taken and signed the day and year
above written, before me

The mark of
† A. M.

J. P.

B. Warrant for apprehending the reputed father
before the birth; on 6 G. 2. c. 31.

Westmorland. { To the constable of _____

WHEREAS A. M. of _____ in the said county, singlewoman, hath by her voluntary examination taken in writing upon oath, before me _____ one of his majesty's justices of the peace in and for the said county, this present day declared herself to be with child, and that the said child is likely to be born a bastard, and to be chargeable to the parish of _____ in the said county, and that A. F. of _____ in the said county, weaver, is the father of the said child; And whereas O. P. one of the overseers of the poor of the parish of _____ aforesaid, in order to indemnify the said parish in the premises, hath applied to me to issue out my warrant for the apprehending of the said A. F. I do therefore hereby command you, immediately to apprehend the said A. F. and to bring him before me or some other of his majesty's justices of the peace for the said county, to find security to indemnify the
said

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said parish of — or else to find sufficient surety for his appearance at the next general quarter sessions, [or, next general sessions] of the peace to be holden for the said county, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elisabeth, concerning bastards begotten and born out of lawful matrimony. Given under my hand and seal the — day of, &c.

The like after the birth.

Westmoreland. { To the constable of —

WHEREAS A. M. of — in the said county, singlwoman, hath by her examination taken in writing upon oath, before me — one of his majesty's justices of the peace in and for the said county, declared that on the — day of — now last past, at — in the parish of — in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of — and hath charged A. F. of — in the said county, weaver, with having gotten her with child of the said bastard child; And whereas O. P. one of the overseers of the poor [and so on, as in the foregoing precedent to the end].

C. Commitment thereupon; by the 6 G. 2. c. 31.

Westmorland. { To the constable of — in the said county, and to the keeper of the house of correction [or, common gaol] at — in the said county.

WHEREAS A. M. of — singlwoman, in her voluntary examination taken in writing upon oath, she — day of — now last past, before me — one of his majesty's justices of the peace in and for the said county, hath declared herself to be with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of — and hath charged A. F. of — gentleman, with having gotten her with child of the said child; [Or, if it is after the birth, then say, Whereas A. M. of — singlwoman, in her examination taken in writing upon oath, before me — one of his majesty's justices of the peace

place in and for the said county, hath declared that on the ——— day of ——— now last past, at ——— in the parish of ——— in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of ——— and hath charged A. F. of ——— weaver, with having gotten her with child of the said bastard child; And whereas the said A. F. being now personally present before me, being brought by my warrant, upon application for that purpose to me made, by O. P. one of the overseers of the poor of the said parish, hath refused to give security to indemnify the said parish, and hath also refused to enter into a recognizance with sufficient surety, upon condition to appear at the next general quarter sessions [or, next general sessions] of the peace to be holden for the said county, and to abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony: These are therefore to command you the said constable to take and convey the said A. F. to the house of correction at ——— in the said county, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you the said keeper of the said house of correction, to receive the said A. F. into your custody in the said house of correction, and him there safely to keep, until he shall give such security, or enter into such recognizance as aforesaid, or be otherwise lawfully delivered from thence. Given under my hand and seal the ——— day of, &c.

D. Bond to indemnify the parish.

KNOW all men by these presents, that we A. F. of ——— in the county of ——— gentleman, and A. S. of ——— yeoman, are held and firmly bound unto ——— churchwardens, and ——— overseers of the poor of the parish of ——— in the said county (in trust for the parishioners of the said parish) in ——— pounds of good and lawful money of Great Britain, to be paid to the said ——— or their certain attorney, their executors, administrators, or assigns: To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each and every of our heirs, executors, and administrators, firmly by these presents; Sealed with our seals, and dated the ——— day of ——— in the ——— year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland.

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land, king, defender of the faith, and so forth, and in the year of our Lord —.

The condition of this obligation is such, that whereas A. M. of — singlewoman, hath in and by her voluntary examination, taken in writing and upon oath before — one of his majesty's justices of the peace in and for the said county of — declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of — and that the abovebounden A. F. is the father of the said child; [If it is after the birth, then say, that whereas A. M. of — singlewoman, in her examination taken in writing upon oath, before — one of his majesty's justices of the peace in and for the said county, hath declared, that on the — day of — now last past, at — in the parish of — in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of — and hath charged the abovebounden A. F. with having gotten her with child of the said bastard child;] If therefore the said A. F. and A. S. or either of them, their or either of their heirs, executors, or administrators, do and shall from time, and at all times hereafter, fully and clearly indemnify and save harmless, as well the above named churchwardens and overseers of the poor of the said parish of — and their successors for the time being, as also all and singular the other parishioners and inhabitants of the said parish of — which now are, or hereafter shall be for the time being, of and from all manner of costs, taxes, rates, assessments, and charges whatsoever, for or by reason of the birth, education, and maintenance of the said child, and of and from all actions, suits, troubles and other charges and demands whatsoever, touching or concerning the same, then this present obligation to be void, otherwise of force.

A. F.

Signed, sealed, and delivered (having been
first duly stamped) in the presence of

A. S.

A. W.

B. W.

E. Recognizance for the reputed father to appear
at the sessions, and to abide such order as shall
be made; on 6 G. 2. c. 31.

Westmorland. **B**E it remembered, that on the — day of
— in the — year of the reign of
our Lord George the third, of Great Britain, France, and
Ireland,

Ireland, king, defender of the faith, and so forth, A. F. of — in the county aforesaid labourer, and A. S. of — in the county aforesaid yeoman, personally came before me J. P. esquire one of the justices of our said lord the king, assigned to keep the peace in the said county, and acknowledged themselves to owe to our said lord the king; that is to say, the said A. F. the sum of — and the said A. S. the sum of — of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements respectively to the use of our said lord the king, his heirs and successors, if the said A. F. shall make default in the condition under written.

Whereas A. M. of — singlewoman, hath in and by her voluntary examination, taken in writing and upon oath, before — one of his majesty's justices of the peace in and for the said county of — declared that she is with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of — and that the above bounden A. F. is the father of the said child; [If it is after the birth, then say, Whereas A. M. of — singlewoman, in and by her examination taken in writing upon oath, before me — one of his majesty's justices of the peace in and for the said county, hath declared that on the — day of — now last past, at — in the parish of — in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said parish of — and hath charged the abovebound A. F. with having gotten her with child of the said bastard child:] The condition of this recognizance is such, that if the abovebound A. F. do and shall appear at the next general quarter sessions [or, the next general sessions] of the peace to be holden for the said county, and shall abide and perform such order or orders as shall be made in pursuance of an act passed in the eighteenth year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony, — then this recognizance to be void, otherwise of force.

Acknowledged before me,

J. P.

Bastards.

F. Summons of the overseers to shew cause why the reputed father should not be discharged out of prison, where no order hath been made within six weeks after the birth of the child (a).

Westmorland. } To the constable of — in the said county.

WHEREAS application hath been made unto me J. P. esquire, one of his majesty's justices of the peace in and for the said county, by A. F. now a prisoner in the house of correction at — in the said county; being charged by A. M. of — in the said county, singlewoman, in and by her voluntary examination taken in writing upon oath, the — day of — now last past, before me, with being the father of a child, with which she declared herself to be then pregnant, and that the said child was likely to be born a bastard, and to be chargeable to the said parish of —. And whereas the said A. F. was on the — day of — last past, brought before me, by virtue of my warrant, upon application for that purpose to me made by O. P. one of the overseers of the poor of the said parish, did then refuse to give security to indemnify the said parish, and also refused to enter into recognizance with sufficient surety upon condition, to appear at the next general quarter sessions [or next general sessions] of the peace to be holden for the said county, to abide and perform such order or orders as should be made, in pursuance of an act made in the eighteenth year of the reign of her late majesty queen Elizabeth, concerning bastards begotten and born out of lawful matrimony. And whereas he the said A. F. was on the — day of — by me committed to the house of correction [or goal] at — aforesaid, in pursuance of the statute in that case made and provided. And whereas the said A. F. doth alledge, that it is more than six weeks since the said A. M. was delivered of the said bastard child, and that no order hath been made in pursuance of the said act of the eighteenth year of her said late majesty queen Elizabeth. These are therefore to require you the said constable, to summon the overseers of the poor of the said parish of — to appear before me at — in the said county, on — the — day of — next, at the hour of — in the — noon of the same day, to shew cause why the said A. F. should not be discharged from his im-

(a) A form of the complaint or application may be easily made out from the summons.

prisonment

prisonment in the said house of correction [or gaol], as directed by the act of parliament for that purpose: And be you then there to certify what you shall have done in the execution hereof. Herein fail you not. Given under my hand and seal the — day of —.

G. Liberate thereupon.

Westmorland. { J. P. esquire one of the justices of our lord the king assigned to keep the peace in the said county, To the keeper of the house of correction at — in the said county.

WHEREAS A. M. of — in the said county, singlwoman, in and by her voluntary examination taken in writing upon oath, the — day of — now last past, before me the justice aforesaid, declared herself to be with child, and that the said child was likely to be born a bastard, and to be chargeable to the parish of — in the said county, and that A. F. of — in the said county, husbandman, did get her with child of the said bastard child. And whereas the said A. F. now in your custody in your said house of correction, in pursuance of my warrant of commitment for that purpose, hath applied to me to be discharged from his imprisonment. And whereas O. P. one of the overseers of the poor of the said parish, hath this day appeared before me, having been duly summoned for that purpose, but hath not shewn any cause why the said A. F. should not be discharged as the statute in that case directs; [Or, if no overseer appear, say, And whereas it hath been duly proved upon the oath of A. C. constable of —, that the overseers of the poor of the said parish of — were duly summoned to shew cause why the said A. F. should not be discharged from his imprisonment as the statute in that behalf directs; but that all of the said overseers have neglected to appear before me at the time and place appointed by my summons.] And it appearing unto me on the oath of A. W. of — that it is now more than six weeks since the said A. M. was delivered of the said bastard child; and also that no order hath been made in pursuance of the said act of the eighteenth year of her said late majesty queen Elizabeth. These are therefore in his said majesty's name to authorize and require you the said keeper of the said house of correction, to forbear to detain the said A. F. any longer in your custody, and to release him from thence, and suffer him to go at large, provided he be not detained in your custody for any other cause. Given under my hand and seal the — day of —.

Bastards.

H. Warrant of the two next justices, for the mother, with a summons for the reputed father, to make the order of filiation and maintenance; on the 18 *El. c. 3.*

Westmorland. { To the constable of ———

*W*HEREAS information hath been made unto us ——— two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and both of us residing in [or next unto] the limits of the parish church within the parish of ——— in the said county, as well upon the complaint of the churchwardens and overseers of the poor of the said parish, as on the oath of A. M. of ——— singlewoman, that on the ——— day of ——— last past, she the said A. M. was delivered of a (male) bastard child at ——— in the said parish, and that A. F. of ——— in the said county, taylor, is the father of the said bastard child, and that the said bastard child is now living, and chargeable [or, likely to become chargeable] to the said parish of ———. These are therefore to command you to bring the said A. M. before us, at the house of ——— in the said county, on ——— the ——— day of ——— at the hour of ——— in the afternoon of the same day, to be by us further examined, touching the premises; and that you give notice thereof, unto the said A. F. that he may likewise be at the time and place aforesaid, to make his lawful defence: To the end that upon the examination of the cause and circumstance, we may take such order therein, as to right doth appertain. And what you shall do in the execution hereof, you are to make known unto us at the time and place aforesaid. Given under our hands and seals, the ——— day of, &c.

I. The order of filiation and maintenance is inserted before, in the body of the title.

K. Commitment for not obeying the order of filiation; on 18 *El. c. 3.*

Westmorland. { To the constable of ——— in the said county, and to the keeper of the house of correction at ——— in the said county.

*W*HEREAS by an order under the hands and seals of us J. P. and K. P. two of his majesty's justices of the peace
in

in and for the said county, and both of us residing in [or next unto] the limits of the parish church within the parish of — in the said county, one whereof is of the quorum, A. F. of — in the said county, husbandman, is adjudged to be the reputed father of a male bastard child lately born of the body of A. M. of — single woman, at — in the said parish of —. And whereas it was in and by such order ordered [here insert the substance of the order]. And whereas it appears to us the said justices, on the oath of O. P. of —, that the said A. F. had due notice of the said order, a true copy thereof in writing having been personally delivered to him the said A. F. on — the — day of — last past, by the said O. P. And whereas the said A. F. hath not observed nor performed the said order. These are therefore to charge and command you the said constable, forthwith to apprehend the said A. F. and him safely to convey to the house of correction at — in the said county, and there deliver him to the keeper thereof, together with this precept. And we do hereby also command you the said keeper of the said house of correction, to receive the said A. F. into your custody in the said house of correction, and him there safely to keep, except he shall put in sufficient surety to perform the said order, or else enter into a recognizance personally to appear at the next general quarter sessions of the peace to be holden in and for the said county, and also to abide such order as shall be then made by the court, concerning the said bastard child, if any such order shall be then made; and if not, then to do and perform the order already made in the premises as aforesaid. Given under our hands and seals the — day of —

L. Condition of a recognizance to appear at the next sessions, after the order not performed; on the 18 El. c. 3.

WHEREAS by an order under the hands and seals of us — two of his majesty's justices of the peace for the said county, one whereof is of the quorum, and both of us residing in [or next unto] the limits of the parish church within the parish of — in the said county, A. F. of — in the said county, taylor, is adjudged to be the reputed father of a bastard child lately born of the body of A. M. of — single woman, at — in the said parish of — [and then set forth what was ordered therein further]. And whereas the said A. F. hath not observed nor performed the said order: The condition therefore of this recognizance is such, that if the above-bound A. F. shall observe and perform the said order, or

Bastards.

shall personally appear at the next general sessions of the peace, to be holden in and for the said county, and shall then and there abide such order as shall be then made by the court, concerning the said bastard child, if any such order shall be then made; and if no such order shall be then made or taken by the said court, if the said A. F. do and shall perform the order already by us made as aforesaid; then this recognizance to be void.

M. Warrant to apprehend the mother of a bastard child, in order to her being sent to the house of correction.

Westmorland. { To the constable of — in the said county.

FORASMUCH as A. J. of — in the said county, yeoman, hath this day made oath before us J. P. and K. P. esquires, two of his majesty's justices of the peace in and for the said county, that A. M. late of — in the said county, singlwsman, on the — day of — last past, was delivered of a — bastard child at — in the parish of — in the said county, and that the said bastard child is now living and chargeable to the said parish of —. These are therefore to command you in his majesty's name to apprehend and bring before us the said A. M. to answer the premises, and to be further dealt withal according to law. Herein fail you not. Given under our hands and seals, the — day of —.

N. Commitment thereupon.

Westmorland. J. P. & K. P. esquires, two of the justices of our lord the king assigned to keep the peace within the said county. To the constable of — in the said county, and to the keeper of the house of correction at — in the said county. These are to command you the said constable in his said majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said house of correction, the body of A. M. late of — in the said county, singlwsman, charged before us upon the oath of A. W. of — in the said county, with having been delivered of a male bastard child on the — day of — now last past, at — in the parish of — in the said county, which said bastard child is now living and chargeable to the said parish of —. And you the said keeper are hereby required to receive the said A. M.

Bastards.

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A. M. into your custody in the said house of correction, and her there to punish and set on work, during the term of one whole year, according to the form of the statute in that case made and provided. Herein fail you not. Given under our hands and seals, the ——— day of ———.

O. Order to seize the goods, or the annual profit of lands, of the father or mother of bastard children, who shall run away and leave them upon the charge of the parish where born; on 13 & 14 C. 2. c. 12.

Westmorland. { To the churchwardens and overseers of the poor of the parish of ——— in the said county.

WHEREAS A. C. and B. C. churchwardens, and A. O. and B. O. overseers of the poor of the parish of ——— in the said county, have made complaint unto us J. P. and K. P. two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, that A. F. late of the said parish of ——— hath run away out of the said parish, and that the place of his abode is not known, and that the said A. F. hath left his male bastard child, aged ——— years, and born within the said parish of ——— upon the charge of the said parish, although the said A. F. hath an estate sufficient to discharge such parish from the charge thereof. And whereas we the said justices, having duly examined into the cause and circumstance of the said complaint, as well upon oath, as otherwise, it doth appear unto us, and we do adjudge that the said complaint is true; and we do also adjudge him the said A. F. to be the reputed father of the said bastard child. These are therefore in his majesty's name, to authorize you the said churchwardens and overseers of the poor of the said parish, to take and seize so much of the goods and chattels, and to receive so much of the annual rents and profits of the lands of the said A. F. as shall amount to the sum of ———, which we do hereby appoint and order you to receive towards the discharge of the said parish, and for the bringing up and providing for the said bastard child; and you are hereby required to attend at the next general quarter sessions of the peace to be holden in and for the said county, in order that this present order may be then and there confirmed, according to the form of the statute in that case made and provided. Given under our hands and seals the ——— day of ———.

Battery.

Battery. See Assault.
 Bawdy-houses. See Lewdness.
 Beer. See Cyst.
 Behaviour. See Surety.

Bent.

WHEREAS on the north-west coasts of *England*, and especially in the county of *Lancaster*, the sea is bounded; and the lands are prevented from being overflowed, by large hills, the sand of which is so loose, that in dry weather it is thrown by the winds to the adjacent lands, to the damage thereof, and the danger of the inhabitants, who are exposed thereby to the inundation of the sea; to prevent which, the land-owners are at great charges, annually to plant and maintain a sort of rush or shrub called *starr* or *bent*; but many disorderly persons pluck up and carry away the same, to make mats and brushes: Therefore if any person without consent of the owner, shall cut, pull up, or carry away any *starr* or *bent* planted or set on the said hills on the north-west coasts of *England*, on complaint thereof on oath to one justice, the offender shall be summoned, and on default of appearing, the justice shall issue his warrant to apprehend and bring him before him; and being convicted on oath of one witness, or confession, he shall forfeit 20 s. half to the informer and half to the owner of the bent, by distress; and for want of sufficient distress, to be sent to the house of correction for three months, to be kept to hard labour; and for a second offence, to be committed to the house of correction for one year, to be whipt and kept to hard labour. 15 G. 2. c. 33. s. 6.

And if any *starr* or *bent* shall be found within five miles of the said sand hills, the persons convicted of having the same in custody shall forfeit 20 s. in like manner, and for want of sufficient distress shall suffer three months imprisonment, and hard labour in the house of correction. *Id.* s. 7.

But this shall not restrain any persons from the exercise of any ancient prescriptive right, to cut *starr* or *bent* on the sea coasts in the county of *Cumberland*. *Id.* s. 8.

Bigamy.

AS *bigamy* in our law seems for the most part to be used to signify the having of two wives successively one after the other, I shall take the liberty to transfer the offence which is commonly treated of under this title unto the title *Poligamy*, which signifies more properly the having two or more wives or husbands at the same time.

Black act.

IN order to avoid repeating the same regulations so many times over, as the offences here under mentioned are treated of under their respective titles in the different parts of this book; it is thought proper to insert here at large the whole law relating to them all together, and to refer from thence to this title for the knowledge of the several particulars.

By the 9 G. c. 22. (commonly called the *Waltham black act*, occasioned by the enormities committed in *Waltham Forest*, near *South Waltham* in *Hampshire*, by persons in disguise, or with their faces blacked) which act is required to be read at every sessions and leet; and by the 6 G. 2. c. 37. and the 10 G. 2. c. 32. which by several continuances were in force till Sept. 1, 1757, &c. and finally by the 31 G. 2. c. 42. were made perpetual: and also by the 27 G. 2. c. 15. it is enacted as followeth:

If any person or persons, *being armed with swords, fire-arms, or other offensive weapons*, and having his or their *faces blacked*, or being *otherwise disguised*, shall (1) appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer hath been or shall be usually kept; or (2) in any warren or place where hares or conies have been or shall be usually kept; or (3) in any high road, open heath, common, or down; or (4) shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer; or (5) unlawfully rob any warren or place where conies or hares are usually kept; or (6) shall unlawfully steal or take away any fish out of any river or pond: Or if any person or persons (*that is, whether armed and disguised or not*) shall (7) unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, fed or kept in
any

any places in any of the king's forests or chases, which are or shall be inclosed with pales, rails, or other fences; or in any park, paddock, or grounds inclosed; where deer have been or shall be usually kept; or (8) shall unlawfully and maliciously break down the head or mound of any fish pond, whereby the fish shall be lost or destroyed; or (9) shall unlawfully and maliciously kill, maim, or wound any cattle; or (10) cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter or profit; or (11) shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or (12) shall wilfully and maliciously shoot at any person in any dwelling house or other place; or (13) shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing; [or threatening to kill or murder any of his majesty's subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw; 27 G. 2. c. 15.] or (14) shall forcibly rescue any person being lawfully in custody of any officer or other person, for any the said offences; or (15) shall by gift or promise of money, or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act; or (16) shall unlawfully and maliciously break down, or cut down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; or (17) shall unlawfully and maliciously cut any hop-binds growing on poles in any plantation of hops; or (18) shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal:

Every person so offending, being thereof lawfully convicted (in any county in *England*) shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy; but not to work corruption of blood, nor forfeiture of lands or goods.

Note; I have added the words above (*whether armed and disguised or not*) to obviate an error which runs thro' most of the books, in a very material part of this statute. They do suppose that a person must be *armed and disguised* to commit any of the offences abovementioned, even the sending of a threatening letter, or persuading another to be an accomplice; whereas it seemeth somewhat clear, that to be armed and disguised is only necessary to constitute any of the six first offences, and that any person what-
soever

foever may be guilty of any of the other following offences, whether armed and disguised or not.

Shall appear in any high road] T. 9 G. 2. K. against *Baylis and Reynolds*. The indictment was, that the defendants at *Ledford* in the county of *Hereford*, being armed with offensive weapons, and having their faces blacked, and being disguised, did feloniously appear in the high road there, against the form of the statute. The evidence was, that there was a great number of rioters assembled with intent to cut down some turnpikes set up in that county, and the prisoners were at the head of them, with their faces blacked so as it could not be known who they were, having on women's gowns, caps, and straw hats, and each an axe in his hand, and they advancing foremost were taken by the constables then assembled by the justices; and after they were taken and confined, the rest of the rioters did cut down the turnpikes. L. *Hardwicke* Ch. J. directed the jury thus: The several facts mentioned in the act are not to be taken as being parts of the same offence, but are every of them several offences; and this is a direct separate crime from the rest. It is a single crime, and is for appearing in the high road with faces blacked, and being otherwise disguised. All the other matters proved are but as circumstances, but were properly enough given in evidence, in order to shew the nature of the fact. Therefore, if upon the evidence you believe the prisoners did appear in the high road with their faces blacked, that is sufficient within the act, or that they were otherwise disguised, you are to find them guilty. The jury immediately, without going out of court, found them guilty; and they were ordered for execution. *Cases in the time of L. Hardwicke*, 291.

Kill, maim, or wound any cattle] M. 11 G. 3. K. and *Paty*. At the assizes at *Abingdon*, before Mr. J. *Blackstone*, the prisoner, a lad of 18 years of age, was capitally convicted, on an indictment for feloniously, unlawfully, knowingly, wilfully, and maliciously shooting at and killing one mare and one colt. It was moved in arrest of judgment, that the mare and colt are not averred in the indictment to be *cattle* within this statute, and that the word *cattle* doth not by law necessarily include horses, mares, and colts: That the statutes for regulating the sale of cattle, have thought it necessary to mention the several species of beasts to which the provisions of the said acts shall extend: That the book of rates distinguishes between the subsidy on *great cattle* imported, viz. 50s; and

and that on *horses and mares*, viz. 101: That the statute of 22 C. 2. c. 13. distinguishes between the encouragement given for breeding *cattle of all sorts*, and for breeding *horses*: That when the statute of 14 G. 2. c. 6. made it felony without clergy to steal *sheep or other cattle*, it was found necessary to specify, by 15 G. 2. c. 34. what cattle were intended by the act. Upon these objections, the judge respited sentence till the next assizes, and in the mean time laid the case before all the judges; who unanimously agreed, that as the statute of 22 & 23 C. 2. c. 7. had made the offence of killing horses by night a single felony; this statute was only to be considered as an extension of that statute: And some precedents were cited of capital convictions (but none of executions) upon this branch of the statute. Wherefore it was agreed, that judgment of death should be given at the next assizes. [After which, he was reprieved for transportation; and afterwards, upon strong applications from the country, received a free pardon.] *Black. Rep.* 721.

And in the case of *John Paty* it was determined, that this act is an extension of 22 & 23 C. 2. s. 7. and that horses, mares, and colts, are included in the word cattle. *Leach's Cr. Law* 66. (a)

Being thereof lawfully convicted in any county in England] In the same manner and form, as if the fact had been committed in such county. And it is at the option of the prosecutor in what court he will prosecute. *Black. Rep.* 733.

And for the more easy and speedy bringing the offenders to justice, if any person shall be charged with being guilty of any the said offences, before any two justices where the offence shall be committed, by information of one or more credible persons on oath by them to be subscribed, the said justices shall forthwith certify under their hands and seals, and return such information to one of the principal secretaries of state; who shall lay the same, as soon as conveniently may be, before the king in his privy council: whereupon the king may make order in such his council, requiring the offender to surrender himself in forty days, to any of the justices of the king's bench, or to any justice of the peace, to the end that he may be forthcoming to answer the said offence according to due course of law; which order shall be forthwith transmitted to the sheriff of the county where the offence was committed, and shall

(a) See this case more at large, title *Cattle*.

(in six days after receipt thereof) be proclaimed by him or his officers, between ten and two of the clock, in the market places, on the market days, of two market towns in the county, near the place where the offence was committed; and a true copy of such order shall be affixed upon some publick place in such market towns: And if such offender shall not surrender himself pursuant to such order, he shall from the day appointed for his surrender, be adjudged convicted and attainted of felony, and shall suffer pains of death, as in case of a person convicted and attainted by verdict and judgment of felony, without benefit of clergy. And the court of king's bench, or judges of assize, on producing to them such order in council, under the seal of the said council, may award execution accordingly. *f. 4.*

And if any person, after the time appointed for surrender shall be expired, shall conceal, aid, abet, or succour such offender, knowing him to have been so charged, and to have been required to surrender himself by such order, and shall be lawfully convicted thereof; he shall be guilty of felony without benefit of clergy. *f. 5.*

But this shall not hinder any judge, justice of the peace, magistrate, officer, or minister of justice, from apprehending and securing such offender, by the ordinary course of law: And if he be taken and secured before the time of surrender, he shall have his trial by due course of law. *f. 6.*

And the inhabitants of the hundred shall make satisfaction (not exceeding 200*l.*) for the damages sustained by the killing or maiming of cattle; cutting down or destroying trees; setting fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood; breaking or cutting down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; cutting hop-binds growing on poles in any plantation of hops; setting on fire, or causing to be set on fire, any mine, pit, or delph of coal or cannel coal; the same to be rateably taxed, and levied, as in cases of robbery by the statute of 27 *El. c. 13.*—*f. 7.*

But no person shall be enabled to recover damages, unless he shall, by himself or servant, in two days after the damage done, give notice of the offence unto some of the inhabitants of some town, village, or hamlet near to the place where the fact was committed; and shall, in four days after such notice, give in his examination on oath, or the examination on oath of his servant who had the

care

Black act.

care of the same, before a justice inhabiting in or near the hundred, whether he knows the person or persons that committed the fact, or any of them; and if upon such examination it be confessed, that the examinant knows the said persons, or any of them, then such person confessing shall be bound by recognizance to prosecute the offender by indictment or otherwise according to law. *f. 8.*

And if an offender be apprehended and lawfully convicted, in six months after the offence committed, the hundred shall not be liable. *f. 9.*

And the action shall not be commenced but within one year after the offence committed. *f. 10.*

And if any person shall apprehend, or cause to be convicted, any such offender above mentioned, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or securing, or endeavouring to apprehend or secure any such offender; on proof thereof made at the sessions where the offence was committed, or the party killed or wounded, by the person so apprehending or causing the offender to be convicted, or the person so wounded, or the executors or administrators of the party killed, the justices shall give a certificate thereof to the person wounded, or the executors or administrators of the person killed; by which they shall be entitled to receive of the sheriff 50*l.* to be allowed in his accounts; which he shall pay in thirty days from the time the certificate shall be shewed to him, on pain of forfeiting to the party 10*l.* for which, and for the penalty, the party may bring his action. *f. 12.*

Black lead.

IT having been found by experience, that wad, or black cawke, commonly called black lead, is necessary for divers useful purposes, and more particularly in the casting of bomb shells, round shot, and cannon balls, and that the same hath been discovered in one mountain or ridge of hills only in this realm, and great destruction having been made thereof of late years by evil disposed persons; therefore it is enacted, that every person who shall unlawfully break, or by force enter into, any mine or wad hold of wad or black cawke, commonly called black lead, or into

any pit, shaft, or vein thereof; or shall unlawfully take and carry away from thence any wad, black cawke, or black lead; or shall aid, hire, or command any person to commit any the said offences, shall be guilty of felony, and the court or judge may order him to be committed to prison, or the house of correction not exceeding one year, to be kept to hard labour, and to be publickly whipt by the common hangman, or by the master of such house of correction, at the times, and places, and in such manner as the court shall think proper; or he may be transported for a term not exceeding seven years; and if he shall voluntarily escape, or break prison, or return from transportation before the time, he shall be guilty of felony without benefit of clergy. 25 G. 2. c. 10. s. 1.

And if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods. s. 3.

Blasphemy and profaneness.

ALL blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also such corporal punishment, as to the court shall seem meet, according to the heinousness of the crime. 1 Haw. 6, 7.

Blasphemy.

Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 Haw. 7.

Depraving the established religion.

No person shall have any benefit of the toleration act, who shall deny in his preaching or writing, the doctrine of the blessed Trinity, as it is set forth in the 39 articles. 1 W. Jess. 1. c. 18. s. 17.

Denying the Trinity.

If any person shall in any stage play, interlude, shew, may-game, or pageant, jestingly or profanely speak or use

Representing the Deity in stage plays.

Blasphemy and profaneness.

the holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity; he shall forfeit 10*l.* half to the king, and half to him that shall sue. 3 *J. c.* 21.

Christians de-
praving the chri-
stian religion.

If any person having been educated in, or at any time having made profession of the christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy Trinity to be God: or shall assert or maintain there are more gods than one; or shall deny the christian religion to be true, or the holy scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall for the first offence be incapable to have any office ecclesiastical, civil, or military, (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction); and for the second offence he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years. 9 & 10 *W. c.* 32.

But no person shall be prosecuted for any words spoken unless the information be given to a justice of the peace, within four days after the words spoken, and the prosecution of such offence be within three months after such information. *Id.*

Case of Edmund
Curl.

M. 1 G. 2. K. and Curl. An information was exhibited by the attorney general, against *Edmund Curl*, for printing and publishing two obscene books, the one styled *The nun in her smock*; the other, *The art of flogging*; setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was an offence properly within their jurisdiction; they said, that religion is a part of the common law, and therefore whatever is an offence against that, is evidently an offence against the common law. And the defendant was set in the pillory. *Str.* 788. 1 *Barnardist.* 29.

Case of Thomas
Woolston.

E. 2 G. 2. K. and Woolston. He was convicted on four informations, for his blasphemous discourses on the miracles of our Saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against christianity in ge-
neral

neral was not an offence punishable in the temporal courts at common law: They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include dispute between learned men upon particular controverted points.. The next term he was brought up, and fined 25 l. for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000 l. and 2000 l. by others. *Str.* 834.

In the year 1656, *James Nayler* for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red hot iron, and to be whipped, and stigmatized in the forehead with the letter B. *Case of James Nayler.*

M. 3 G. 3. K. and Peter Annet. The defendant was convicted on an information, for writing a most blasphemous libel in weekly papers, called the *Free Inquirer*; to which he pleaded Guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being 70 years of age, and some symptoms of wildness that appeared on his inspection in court; the court declared, they had mitigated their intended sentence to the following, viz. To be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, inscribed Blasphemy; to be sent to the house of correction, to hard labour, for a year; to pay a fine of 6 s. 8 d.; and to find security, himself in 100 l. and two sureties in 50 l. each, for his good behaviour during life. *Blackst. Rep.* 395. *Case of Peter Annet.*

All persons in or belonging to his majesty's ships, or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose. 22 G. 2. c. 33. *Navy.*
Art. 2.

For profane cursing and swearing, See Swearing.

Books.

If any book shall be taken or otherwise lost out of any parochial library, any justice may grant his warrant

to search for it; and if it shall be found, it shall by order of such justice be restored to the library. 7 Ann. c. 14. s. 10.

Books popish. See Popery.

Borders between England and Scotland. See

Northern Borders.

Brandy. See Excise.

Brass. See Pewter.

Bread.

Former acts
repealed.

THE statute of the 31 G. 2. c. 29. repeals all the former laws relating to the assize of bread, and re-enacts the same, with additions and amendments. Which, throughout the whole, is a very regular and judicious act; so that the author hath nothing more to do than to abridge the same in the order as it stands: not being able, in point of method, to alter it for the better.

Power to set the
assize.

To the intent that a plain and constant rule and method may be duly observed, in making and assizing of the several sorts of bread which shall be made for sale, in any place where an assize shall be thought proper to be set; it is enacted, that it shall be lawful for the court, or for the person or persons herein authorised to set the assize of bread, to set or ascertain in any place within their jurisdiction, the assize and weight of all sorts of bread which shall be made for sale, or exposed to sale, and the price to be paid for the same, when and as often as they shall think proper. 31 G. 2. c. 29. s. 2.

In proportion to
the price of corn.

And therein respect shall be had to the price, which the grain, meal, or flour shall bear, in the market or markets in or near to the places for which such assize shall be set. *Id.*

Allowance to
the bakers.

And making reasonable allowance to the bakers for their charges, labour and profit, as they shall deem proper. *Id.*

Penalty of dis-
obeying the as-
sise.

Where an assize shall be thought proper to be set, no person shall make for sale, or sell, or expose to or for sale, any sort of bread, except wheaten and household (otherwise brown bread), and such other sorts of bread as shall

be allowed in the assize : but where it hath been usual to make, or the persons setting the assize shall allow the making of bread, with the meal or flour of rye, barley, oats, beans, or pease, or of any such different sorts of grain mixed together ; the same may be there made and sold accordingly : And if any person shall offend in the premises, and be convicted thereof by confession or oath of one witness, before any magistrate or justice within the limits of their jurisdiction ; he shall forfeit not exceeding 40 s. nor less than 20 s. *s. 3.*

And in every place where an assize shall be thought proper to be set ; the assize and weight of the several sorts of bread which shall be there made, shall be set according to the following tables :

T A B L E I.

Of the affize and price of bread made of Wheat.

Price of the bushel of wheat and bak- ing.	Weight.				Price.							
	The penny loaf.				Quarter loaf.		Half peck.		Peck loaf.			
	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.	Wheat.	Household.
s. d.	oz. dr.	oz. dr.	s. d.	oz. dr.	s. d.	oz. dr.	s. d.	oz. dr.	s. d.	oz. dr.	s. d.	oz. dr.
2 9	22 4	29 4	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 6 $\frac{1}{2}$	0 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$
3 0	20 4	27 1	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 7	0 5 $\frac{1}{2}$	1 0	0 5 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$
3 3	18 9	25 4	0 3 $\frac{1}{2}$	0 2 $\frac{1}{2}$	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11	1 3	0 11
3 6	17 6	23 3	0 4	0 3	0 8	0 6	1 1	0 6	1 4	1 0	1 4	1 0
3 9	16 6	21 6	0 4 $\frac{1}{2}$	0 3 $\frac{1}{2}$	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5 $\frac{1}{2}$	1 1	1 5 $\frac{1}{2}$	1 1
4 0	15 4	20 4	0 4 $\frac{1}{2}$	0 3 $\frac{1}{2}$	0 9	0 6 $\frac{1}{2}$	1 2	0 6 $\frac{1}{2}$	1 6 $\frac{1}{2}$	1 1 $\frac{1}{2}$	1 6 $\frac{1}{2}$	1 1 $\frac{1}{2}$
4 3	14 4	19 1	0 4 $\frac{1}{2}$	0 3 $\frac{1}{2}$	0 9 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$
4 6	13 9	17 15	0 5	0 3 $\frac{1}{2}$	0 10 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 3	0 7 $\frac{1}{2}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$
4 9	12 12	17 1	0 5 $\frac{1}{2}$	0 4	0 10 $\frac{1}{2}$	0 8	1 3 $\frac{1}{2}$	0 8	1 9 $\frac{1}{2}$	1 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	1 4 $\frac{1}{2}$
5 0	12 1	16 6	0 5 $\frac{1}{2}$	0 4 $\frac{1}{2}$	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 4	0 8 $\frac{1}{2}$	1 11	1 5	1 11	1 5
5 3	11 9	15 7	0 6	0 4 $\frac{1}{2}$	1 0	0 9	1 4 $\frac{1}{2}$	0 9	2 0	1 6	2 0	1 6
5 6	11 2	14 10	0 6 $\frac{1}{2}$	0 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 5	0 9 $\frac{1}{2}$	2 1	1 7	2 1	1 7
5 9	10 8	14 4	0 6 $\frac{1}{2}$	0 5	1 1 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 5 $\frac{1}{2}$	0 9 $\frac{1}{2}$	2 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$	2 2 $\frac{1}{2}$	1 7 $\frac{1}{2}$
6 0	10 2	13 9	0 7	0 5 $\frac{1}{2}$	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	1 6	0 10 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$
6 3	9 11	13 1	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 2	0 10 $\frac{1}{2}$	1 6 $\frac{1}{2}$	0 10 $\frac{1}{2}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$
6 6	9 4	12 10	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3	0 11	1 7	0 11	2 6	1 10	2 6	1 10
6 9	9 0	12 1	0 7 $\frac{1}{2}$	0 5 $\frac{1}{2}$	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	1 7 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	2 7	1 11
7 0	8 11	11 9	0 8	0 6	1 4	1 0	1 8	1 0	2 8	2 0	2 8	2 0
7 3	8 7	11 2	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	1 8 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 9	2 1	2 9	2 1
7 6	8 3	10 11	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5	1 1	1 9	1 1	2 10	2 2	2 10	2 2
7 9	7 14	10 6	0 8 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 5 $\frac{1}{2}$	1 1 $\frac{1}{2}$	1 9 $\frac{1}{2}$	1 1 $\frac{1}{2}$	2 11 $\frac{1}{2}$	2 2 $\frac{1}{2}$	2 11 $\frac{1}{2}$	2 2 $\frac{1}{2}$
8 0	7 10	10 2	0 9	0 6 $\frac{1}{2}$	1 6 $\frac{1}{2}$	1 1 $\frac{1}{2}$	1 10	1 1 $\frac{1}{2}$	3 0 $\frac{1}{2}$	2 3 $\frac{1}{2}$	3 0 $\frac{1}{2}$	2 3 $\frac{1}{2}$
8 3	7 5	9 15	0 9 $\frac{1}{2}$	0 7	1 7	1 2	1 11	1 2	3 2	2 4	3 2	2 4
8 6	7 2	9 9	0 9 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	1 11 $\frac{1}{2}$	1 2 $\frac{1}{2}$	3 3	2 5	3 3	2 5
8 9	6 15	9 4	0 10	0 7 $\frac{1}{2}$	1 8	1 3	1 12	1 3	3 4	2 6	3 4	2 6
9 0	6 13	8 15	0 10 $\frac{1}{2}$	0 7 $\frac{1}{2}$	1 8 $\frac{1}{2}$	1 3 $\frac{1}{2}$	1 12 $\frac{1}{2}$	1 3 $\frac{1}{2}$	3 5	2 7	3 5	2 7
9 3	6 9	8 12	0 10 $\frac{1}{2}$	0 8	1 9	1 3 $\frac{1}{2}$	1 13	1 3 $\frac{1}{2}$	3 6 $\frac{1}{2}$	2 7 $\frac{1}{2}$	3 6 $\frac{1}{2}$	2 7 $\frac{1}{2}$
9 6	6 7	8 8	0 10 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 9 $\frac{1}{2}$	1 4	1 13 $\frac{1}{2}$	1 4	3 7 $\frac{1}{2}$	2 8 $\frac{1}{2}$	3 7 $\frac{1}{2}$	2 8 $\frac{1}{2}$
9 9	6 4	8 5	0 11	0 8 $\frac{1}{2}$	1 10 $\frac{1}{2}$	1 4 $\frac{1}{2}$	1 14	1 4 $\frac{1}{2}$	3 8 $\frac{1}{2}$	2 9 $\frac{1}{2}$	3 8 $\frac{1}{2}$	2 9 $\frac{1}{2}$
10 0	6 1	8 2	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 11	1 5	1 14 $\frac{1}{2}$	1 5	3 10	2 10	3 10	2 10
10 3	5 15	7 15	0 11 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 11 $\frac{1}{2}$	1 5 $\frac{1}{2}$	1 15	1 5 $\frac{1}{2}$	3 11	2 11	3 11	2 11
10 6	5 13	7 12	1 0	0 9	2 0	1 6	1 15 $\frac{1}{2}$	1 6	4 0	3 0	4 0	3 0
10 9	5 11	7 9	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	2 0 $\frac{1}{2}$	1 6 $\frac{1}{2}$	1 16	1 6 $\frac{1}{2}$	4 1	3 1	4 1	3 1

Price of the bushel of wheat and bak- ing.	Weight.				Price.							
	The penny loaf.		Quarter loaf.		Half peck.		Peck loaf.					
	Wheaten.	Houfhold.	Wheaten.	Houfhold.	Wheaten.	Houfhold.	Wheaten.	Houfhold.	Wheaten.	Houfhold.	Wheaten.	Houfhold.
s. d.	oz. dr.	oz. dr.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
11 0	5 9	7 5	1 0 $\frac{1}{2}$	0 9 $\frac{1}{2}$	2 1	1 7	4 2	3 2				
11 3	5 6	7 3	1 0 $\frac{1}{4}$	0 9 $\frac{1}{4}$	2 1 $\frac{1}{2}$	1 7 $\frac{1}{2}$	4 3 $\frac{1}{2}$	3 2 $\frac{1}{2}$				
11 6	5 5	7 2	1 1	0 10	2 2 $\frac{1}{4}$	1 7 $\frac{1}{4}$	4 4 $\frac{1}{2}$	3 3 $\frac{1}{2}$				
11 9	5 2	6 15	1 1 $\frac{1}{2}$	0 10	2 3	1 8	4 5	3 4				
12 0	5 1	6 13	1 1 $\frac{3}{4}$	0 10 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	4 7	3 5				
12 3	4 15	6 10	1 2	0 10 $\frac{1}{4}$	2 4	1 9	4 8	3 6				
12 6	4 14	6 8	1 2 $\frac{1}{4}$	0 10 $\frac{3}{4}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	4 9	3 7				
12 9	4 13	6 5	1 2 $\frac{1}{2}$	0 11	2 5	1 10	4 10	3 8				
13 0	4 11	6 4	1 3	0 11 $\frac{1}{4}$	2 5 $\frac{1}{2}$	1 10 $\frac{1}{4}$	4 11 $\frac{1}{2}$	3 8 $\frac{1}{2}$				
13 3	4 9	6 3	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 6 $\frac{1}{2}$	1 10 $\frac{1}{2}$	5 1	3 9				
13 6	4 8	6 1	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	5 2	3 0				
13 9	4 7	5 15	1 3 $\frac{1}{2}$	0 11 $\frac{1}{4}$	2 7 $\frac{1}{4}$	1 11 $\frac{1}{4}$	5 3	3 11				
14 0	4 5	5 13	1 4	1 0	2 8	2 0	5 4	4 0				
14 3	4 4	5 11	1 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 8 $\frac{1}{2}$	2 0 $\frac{1}{2}$	5 5	4 1				
14 6	4 3	5 9	1 5	1 0 $\frac{1}{2}$	2 9	2 1	5 6	4 2				

In the first column is the price of the bushel of wheat *Winchester* measure, from 2 s. 9 d. to 14 s. 6 d. a bushel, the allowance of the magistrates or justices to the baker for baking being included; and in the next two columns are the *weights* of the several loaves: Then in the other columns are the *prices*. So that, for example, if the price of wheat is 5 s. a bushel, and the magistrates allowance 1 s. 6 d. to the baker for baking; then opposite to 6 s. 6 d. in the first column, will be found the weight and prices of the several loaves.

And as the weight of the penny loaf is here only specified, the weight of larger loaves may be easily ascertained by addition; as for example, a twopenny loaf (when wheat is at the same rate) is twice as much as the penny loaf, the sixpenny loaf six times as much, and the eighteen penny loaf eighteen times as much.

Note, the wheaten loaves are three fourths of the weight of the household loaves; and if the magistrates or justices shall think fit to allow any of the white loaves of the price of one penny or two pence, they are to weigh three fourths of the weight of the wheaten loaves of the same price.

And note, that the prices of the household loaves are always three fourths of the prices of the wheaten loaves;

and where it shall be thought proper to allow of half-quarter loaves, the prices of such loaves (if sold singly) are to be half a farthing higher than is allowed by this table, when it shall so happen that the farthing is split.

And magistrates and justices being to set the affize and fix the price of the several loaves of bread, having respect to the price which the grain, meal, or flour, of which the same are made, shall bear in the market; but no provision being made how they shall know what price the respective sorts of meal and flour should be esteemed to bear, in proportion to the price of wheat; they are therefore to take notice, that the peck loaf of each sort of bread is to weigh when well broken 17 lb. 6 oz. averdupois weight (which consists of 16 drachms to the ounce, and 16 ounces to the pound), and the rest in proportion; and that every sack of meal or flour is to weigh 2 cwt. and 2 qrs. neat; and that from every sack of meal or flour there ought to be produced, on the average, 20 such peck loaves of bread; and, by observing the said rule, magistrates and justices may at all times know if the baker hath more or less than the allowance they intend to give him.

T A B L E II.

Of the affize and price of bread made of the several grains here under mentioned.

This table is divided into three columns. Column 1. contains the prices of the bushel of grain, the allowance for baking included; which prices are adapted so as to serve either for the *Winchester* bushel of rye, barley, oats, beans, maslin (otherwise miscellany, consisting of two thirds wheat and one third rye); the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto; the amount of which being found in column 1, the weight which the loaves ought to be will be found under the column N^o 2. and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under N^o 3.

Example: When the price of the bushel of barley in the market, with the allowance to the baker is 4 s. look for that sum in column 1, and under their respective titles in the same line will be found the weights which the several affize barley loaves should be of, and the price of the peck, barley loaf; and so of each of the other sorts.

Notes.

Bread.

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Note, where bread is allowed at any time to be made for sale, of pease only; the affize and price thereof are to be set and fixed from the bean columns: and where bread is ordered to be made for sale, of a coarse sort of maslin or miscellany grain, consisting of one third rye, one third barley, and one third either pease or beans, the affize and price thereof are to be set and fixed from the barley columns.

Note also, that this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

No. 2.												No. 3.																			
Weight of the penny loaf.												Price of the peck loaf.																			
Rye.				Barley.				Oats.				Madin.				Rye.				Barley.				Oats.				Madin.			
oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.				
1	0	62	8	31	4	83	12	70	0	0	4	0	4	0	3	4	0	4	0	3	4	0	4	0	3	4	0	4			
1	1	50	0	54	0	25	0	67	0	0	5	0	5	0	11	0	4	0	5	0	11	0	4	0	5	0	5	0			
1	1	41	10	45	0	25	14	55	12	46	10	0	7	1	1	0	5	0	6	1	1	0	5	0	6	1	1	0			
1	9	35	1	38	9	17	14	47	14	40	0	0	7	1	3	0	5	0	7	1	3	0	5	0	7	1	3	0			
1	2	31	4	33	12	15	10	41	14	35	0	0	8	1	5	0	6	0	8	1	5	0	6	0	8	1	5	0			
2	3	27	13	30	0	13	14	37	4	31	2	0	10	0	9	1	7	0	9	0	9	1	7	0	9	0	9	0			
2	6	25	0	27	0	12	8	33	8	28	0	0	11	0	10	1	0	8	1	10	0	8	1	0	10	0	10	0			
2	9	22	11	24	9	11	6	30	7	25	6	1	0	0	11	2	1	0	9	1	2	1	0	9	1	0	11	0			
3	0	20	13	22	8	10	7	27	14	23	5	1	1	0	1	2	2	0	10	1	2	2	0	10	1	0	1	0			
3	3	19	4	20	12	9	10	25	12	21	8	1	2	1	2	4	0	10	1	2	4	0	10	1	2	1	1	1			
3	3	17	13	19	4	8	15	23	15	20	0	1	3	1	2	6	0	11	3	2	6	0	11	3	1	2	1	2			
3	3	16	11	18	0	8	5	22	5	18	10	1	4	1	3	2	8	1	4	1	3	2	8	1	0	1	3	1			
4	0	15	10	16	14	7	13	20	15	17	8	1	5	1	4	2	11	1	4	2	11	1	4	2	1	1	4	1			
4	4	14	12	15	14	7	6	19	11	16	8	1	6	1	5	3	0	1	5	3	0	1	5	3	1	5	1	5			
4	4	13	14	15	0	6	15	18	10	15	9	1	8	1	7	3	2	1	6	1	7	3	2	1	6	1	1	6			
4	9	13	2	14	4	6	9	17	11	14	12	1	8	1	8	3	5	1	7	3	5	1	8	3	5	1	7	1			
5	0	12	8	13	8	6	4	16	12	14	0	1	10	1	9	3	8	1	8	3	8	1	9	3	8	1	8	1			
5	3	11	14	12	14	5	15	15	15	13	5	1	11	1	10	3	11	1	9	3	11	1	9	3	11	1	9	1			
5	6	11	5	12	4	5	11	15	3	12	11	2	0	1	11	4	1	7	1	10	4	1	7	1	10	4	1	10			
5	9	10	13	11	12	5	7	14	9	12	2	2	1	2	0	4	3	1	7	1	2	0	4	3	1	7	1	11			
6	0	10	6	11	4	5	3	13	15	11	10	2	2	1	2	0	4	3	1	7	1	2	0	4	3	1	7	2			
6	3	9	0	10	13	5	0	13	6	11	3	2	3	2	2	4	7	1	8	2	2	4	7	1	8	2	2	1			
6	6	9	10	10	6	4	13	12	14	10	12	2	5	2	3	4	9	1	9	2	3	4	9	1	9	2	2	2			
6	9	9	4	10	0	4	10	12	6	10	6	2	6	2	4	5	0	1	10	2	4	5	0	1	10	2	2	3			
7	0	8	15	9	10	4	7	11	15	10	0	3	7	2	5	5	1	1	11	3	5	5	1	1	11	3	2	4			

Every

Affize to be set
in averdupois
weight.

Every affize which shall be set, in any city, town corporate, hundred, division, liberty, rape, or wapentake, shall be set in averdupois weight, and not troy weight; and in the proportions directed by the said tables, or as near as may be; and the said tables shall extend as well to such bread which shall be made of the flour of wheat mixed with the flour of other grain, as also to bread which shall be made with the flour of other grain than wheat, which shall be publickly allowed in any place to be made into bread; and the affize of all such mixed bread shall be set as near as may be according to the said tables. *s. 5.*

Prices of grain
how to be certi-
fied in London.

The prices which the several kinds of grain, meal, and flour, allowed to be made into bread, shall *bona fide* sell for in the markets or places in *London*, where such grain, meal, and flour shall be publickly sold during the whole market, and not at particular times thereof, or on particular contracts only, shall from time to time be given in and certified on oath, on some certain day in every week, as the court of mayor and aldermen shall appoint, by the meal weighers of the said city, or such other persons as the said court shall direct; and shall also, on some certain day in every week to be appointed by the said court, be entered by such meal weighers or other persons to be appointed as aforesaid, in writing under their hands, in some book for that purpose to be provided by the said city, and kept at the town-clerk's office. And the next day after every such price shall be so given in and certified, the affize and weight of all sorts of bread to be sold or exposed to sale, and the price to be paid for the same, shall from time to time be set by the said court, if then sitting; if not, then by the mayor of the said city. And the affize so set shall take place from such time as the said court shall order, and be in force for the said city of *London* and the liberties thereof and the weekly bills of mortality (the city of *Westminster* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surry* excepted), until a new or other affize in *London* shall be set. And after the setting of every such affize by the said court, or by the mayor when the said court shall not sit, the affize so set shall, with all convenient speed, be made publick, in such manner as the said court shall direct. But before any advance or reduction shall in any week be made by the said court or mayor, in the price of bread; the meal weighers or such other persons as aforesaid appointed to make return of the prices of grain, meal, and flour, shall leave in writing

at the common hall of the company of bakers, a copy of every return so made and entered by them as aforesaid, some time of the same day on which they shall make the said return and entry: to the intent that the said company may, in the morning of the next day after every such return and entry shall be made, and before any assize shall be set, have an opportunity to offer to the said court or mayor respectively, all such objections as they shall think fit, against any advance or reduction being that day made. *s. 6.*

The court of mayor and aldermen of every other city where there shall be any such court, and when such court shall sit; and where there shall be no such court, or being any such, when the same shall not sit, the mayor, bailiffs, or other chief magistrate or magistrates of every such other respective city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magistrate or magistrates of every such town corporate or borough; or two justices in such towns and places where there shall be no such mayor, bailiffs, aldermen, or chief magistrates; shall and may from time to time as there shall be occasion, cause the respective prices which the several sorts of grain, meal, and flour (fit to make the different sorts of bread allowed there) shall *bona fide* sell for in the respective publick markets in or near to such place, during the whole market, and not at particular times thereof, or on particular contracts only, to be given in to them and certified upon oath, in such manner, and by such persons, and on such day in every week, as they shall respectively appoint. And the price which shall be so certified, shall be entered by the persons who shall certify the same, in books to be provided and kept by them for that purpose. And within two days after every such price shall be so returned, the assize and weight of bread for such place, and the price to be paid for the same, shall be set by such court or magistrates respectively as aforesaid. And the assize so set shall commence on such day in every week, and be in force for such time not exceeding seven days from the setting of such assize, as such court or magistrates respectively shall direct. *s. 7.*

How in other cities and towns corporate.

If two justices of counties at large, ridings, or divisions, shall at any time think fit to set an assize of bread, for any place within the limits of their jurisdiction; in such case, it shall be lawful for such two justices, to cause the price which grain, meal, and flour (fit to make the several sorts of bread that shall be made for sale in any such place) shall *bona fide* sell for in the respective publick corn market or markets in or near any such

How in places within counties at large.

such place, during the whole market, and not at any particular times thereof, or on special contracts only, to be given and certified on oath to them at their respective places of abode, on such day in every week as they shall appoint, by the clerks of the market or markets in or near such places, or such other person as they shall for that purpose appoint. And the price so returned shall be entered by the persons so returning the same in books to be provided by them and kept for that purpose. And within two days after such return, the assize may be by them set for every such place, for any time not exceeding 14 days from the setting thereof. And the assize so set, from time to time shall commence and be in force at such time after every such setting thereof, and be made publick in such places for which the same shall be so set, in such manner as the justices who set the same shall direct. *s. 8.*

Bakers may inspect the certificate.

Any maker of bread for sale in any such other city, town corporate, borough, or place, where the assize shall at any time be thought proper to be set, shall have liberty at all seasonable times, in the day-time, the next day after such returns shall be made and entered as aforesaid, to see the said entry, without paying any thing for the same; to the intent every such maker of bread for sale may have an opportunity on the said next day after such entry made as aforesaid, to offer to any such court, mayor, bailiffs, aldermen, or other chief magistrate or magistrates, or justices as aforesaid, who shall think fit to set such assize within their respective jurisdiction, and before any such assize shall be set, such objections as he can reasonably make against any advance or reduction to be made in such assize so to be set as aforesaid. *s. 9.*

Bakers to pay no fee for the assize.

No baker of bread for sale shall be liable to pay any fee, gratuity, or reward, to any person for or by means of any assize to be set. *s. 10.*

Form of the returns to be made.

The form of the return or certificate shall be to the effect following.

The prices of grain, meal, and flour, as sold in the corn market in _____ in the _____ of _____ the _____ day of _____.

The best wheat at _____	_____	by the bushel.
The second at _____	_____	by ditto.
The third at _____	_____	by the bushel.
The best wheaten flour at _____	_____	by the sack.
Household flour at _____	_____	by ditto.
Rye at _____	_____	by the bushel.
Rye meal or flour at _____	_____	by ditto.

Barley

Bread.

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Barley at	—	—	—	by ditto.
Barley meal at	—	—	—	by the bushel.
Oats at	—	—	—	by ditto.
Oar meal at	—	—	—	by —
White pease at	—	—	—	by the bushel.
White pea flour or meal at	—	—	—	by —
Beans at	—	—	—	by the bushel.
Bean meal or flour at	—	—	—	by —.

To every of which returns the persons appointed to make the same shall sign their names or marks. *f. 11.*

When an affize shall be set, the same shall be made publick in the form or to the effect following:

Form of publication of the affize.

—, *To wit,* } The affize of bread set the — day
 } of — for — to take place on
 the — day of — now next en-
 suing, and to be in force — for the
 said — of —.

And in places where penny, two-penny, six-penny, twelve penny, and eighteen-penny loaves, shall be made, as followeth:

	lb.	oz.	dr.
The penny loaf wheaten is to weigh			
Ditto household is to weigh —			
The two-penny loaf wheaten is to weigh —			
Ditto household is to weigh —			
The six-penny loaf wheaten is to weigh —			
Ditto household is to weigh —			
The twelve-penny loaf wheaten is to weigh —			
Ditto household is to weigh —			
The eighteen-penny loaf wheaten is to weigh —			
Ditto household is to weigh —			

And in places where quartern, half-peck, and peck loaves be made, then as follows:

	lb.	oz.	dr.		s.	d.
The peck loaf wheaten is to weigh				and is to be fold for		
Ditto household is to weigh				and is to be fold for		

And

And the half peck and quarter of a peck loaves of wheaten and household bread are to weigh in proportion to the weight a peck loaf of wheaten or household bread ought to weigh; and to be sold accordingly in proportion. And when any bread shall be ordered to be made with the meal or flour of rye, barley, oats, pease or beans, either alone, or mixed with the meal or flour of any other grain; the assize of such bread shall be made publick, in such manner as the magistrates or justices, who shall set such assize, shall from time to time direct. *f. 12.*

Bread of different denominations not to be allowed at the same time.

In places where any six-penny, twelve-penny, and eighteen penny loaves shall be allowed to be made or sold, no peck, half peck, or quarter of a peck loaves shall be allowed at the same time to be made or sold; to the intent that one of those sorts of loaves may not be sold, designedly or otherwise, for the other sort thereof, to the injury of unwary people: on pain that every one offending in the premises shall forfeit not exceeding 40s. nor less than 20s. as the magistrate or justice before whom such offender shall be convicted shall think fit. *f. 13.*

Hundreds may be divided for setting the assize.

If the justices of any county, riding, or division, shall in their sessions think fit to ascertain, that any hundred or other place within such division ought to be estimated as of or in any one particular hundred, riding, or division, of any such county, riding, or division, in order that the assize of bread which shall be set for such particular hundred or place may extend to or comprize such other hundred or place; in such case it shall be lawful for them so to do: but by so doing thereof, no justice of any such county, riding, or division shall be excluded from acting as a justice in any hundred, riding, or division of any such county, in which any such particular towns, districts, or places shall lie, or the assize for them shall be set. *f. 14.*

Clerk of the market to keep books.

An entry shall be made from time to time by the clerk of the market, or other person appointed to make return as aforesaid, in a book to be provided and kept by him, of every return by him made; and also of the rate at which the price, assize, and weight of bread shall be set within his jurisdiction: which book any inhabitant may at all seasonable times in the day inspect without fee. *f. 15.*

Assize not to be altered till the price of corn alters 3 d. a bushel.

After the assize shall be set no alteration shall be made therein in any subsequent week, either to rise or sink the same, except when the price of wheat or other grain shall be returned as having risen or fallen 3d. a bushel since

since the last return; no provision being made by the assize tables for altering any assize, when the variation in the price shall not have amounted to, and been returned 3d. a bushel. *s.* 16.

If any meal weigher, clerk of the market, or other person appointed to make returns as aforesaid, shall neglect, omit, or refuse to do any thing by this act required to be done by him, or shall designedly or knowingly make any false return; or if any constable or other peace officer shall refuse or neglect to obey any warrant in writing delivered to him under the hand and seal of any magistrate or justice, or to do any other act requisite to be done by him for carrying this act into execution; he shall forfeit not exceeding 5*l.* nor less than 20*s.* *s.* 17.

Punishment of officers for default.

If any buyer or seller of or dealer in corn, grain, meal, or flour, on reasonable request to him made by the meal weighers of the city of *London*, or by the clerks of the market or other person respectively appointed to make returns as aforesaid; shall refuse to disclose and make known to them the true real prices which the several sorts of grain, meal, and flour shall be *bona fide* bought at or sold by or for him, at any corn market, or other place where corn, grain, meal, or flour is usually openly or publicly sold; or shall knowingly give in any false or untrue price, or which hath been made by any deceitful means; he shall, on conviction thereof by confession, or oath of one witness, or affirmation of a quaker, forfeit not more than 10*l.* nor less than 40*s.* *s.* 18.

Buyer or seller to declare the price of corn.

If any court, magistrate, or justices, who shall have ordered any return to be made as aforesaid, shall, within three days after such return, suspect that the same was not truly and *bona fide* made; they may summon before them any person who shall have bought or sold, or agreed to buy or sell any grain, meal or flour within their respective jurisdictions, or who shall be thought to be likely to give any information concerning the premises; and may examine them upon oath, touching the rates and prices, which the several sorts of grain, meal and flour, or any of them, were really and *bona fide* bought at or sold for, or agreed so to be, by him, at any time within seven days preceding such summons. And if any person so summoned shall neglect or refuse to appear (proof of such summons being made upon oath); or if any person so summoned shall appear, and neglect or refuse to answer such lawful questions touching the premises as shall be proposed to him, without some just or reasonable excuse

Magistrates may send for them.

cuse to be allowed by such court, magistrate, or justices; he shall on conviction by oath of one witness, or by confession, forfeit not exceeding 10*l.* nor less than 40*s.* And if any person so examined, shall wilfully forswear himself, he shall suffer as in cases of perjury.—Provided, that the party summoned be not obliged to travel above five miles from the place of his abode. *f.* 19.

Baker of bread made of other grain than wheat shall conform to the assize.

Whenever any court, magistrate, or justices as aforesaid, shall order any bread to be made with the flour or meal of any other grain than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other sorts of grain, either separate or mixed together; all persons who shall make any bread for sale, in any place where such order shall be made, shall make bread with such mixed meal or flour, in such manner, and of such weight and goodness, and shall sell the same at such prices, as such court, magistrate, or justices respectively shall direct: on pain of forfeiting not more than 5*l.* nor less than 40*s.* *f.* 20.

Regulation by 36 G. 3. c. 22. for making mixed bread.

And whereas it is expedient in order to diminish the consumption of wheat, that bakers should be permitted to make and sell mixed bread, which they cannot now do in places where an assize is set: And whereas it is not expedient to apply to such sorts of bread the restrictions in the tables of the assize and price of bread now established. It is enacted, that any person in any place whatsoever, whether any assize of bread has been set or not, may make and sell *peck, half peck, quartern, and half quartern loaves*, made of the whole produce of wheat, deducting only 5*lb.* of bran *per bushel*; or made of any sort of wheaten flour mixed with meal, or flour of barley, rye, oats, buck wheat, *Indian* corn, pease, beans, rice, or any other kind of grain, or potatoes, in such proportions, and at such prices as the maker and seller thereof shall deem reasonable. 36 G. 3. c. 22. *f.* 1.

And every person who shall make or sell such mixed bread, shall put upon every loaf, a mark in large *Roman* letters, denoting what are the sorts and proportions of such mixture; or a large *Roman* M, together with some mark distinguishing one sort of such bread from another; and shall also affix in some conspicuous part of his shop, or the window thereof, a paper written in large and legible characters at length, specifying the sorts and proportions of the mixtures composing such sorts of bread, and also the marks corresponding to each sort, and the prices thereof. *f.* 2.

And

such bread shall be brought shall think fit: so as such bread which shall be complained of for wanting weight, in any city, town corporate, borough, liberty, or franchise having jurisdiction thereof, or within the weekly bills of mortality, shall be brought before some magistrate, or justice having jurisdiction in the premises, and weighed before him, within 24 hours after the same shall have been baked, sold, or exposed to sale; and so as such bread which shall be complained of for wanting weight, in any hundred, riding, division, liberty, rape, wapentake, or place, shall be brought before some justice within such jurisdiction and weighed before him within three days after the same shall have been baked, sold, or exposed to sale; unless it be made out to the satisfaction of such magistrate or justice, on the behalf of the party complained of, that such deficiency in weight wholly arose from some unavoidable accident in baking, or otherwise, or was occasioned by some contrivance or confederacy. *s.* 24.

Every person who shall make for sale, or sell, or ^{Mark,} expose, or send out to or for sale, any sort of bread whatsoever, shall cause to be fairly marked on every loaf made, sold, carried out, or exposed to sale as wheaten bread, a large roman W; and upon every loaf made, sold, carried out, or exposed to sale as household or brown bread, a large roman H; on pain of forfeiting for every loaf not so marked, not more than 20s. nor less than 5s. (except as to such loaves which shall be rasped after the bespeaking or purchasing thereof, by the particular desire of any person who shall order the same to be rasped for his own use). *s.* 25.

No baker or other person shall ask or take, for any bread which he shall sell or expose to sale, any greater price than such bread shall be ascertained to be sold at by the assize as aforesaid; and no baker, or other person who shall make any bread for sale, shall refuse or decline to sell any loaf or loaves of any of the sorts of bread which in pursuance of this act shall be allowed or ordered to be made, to any person who shall tender ready money in payment for the same, at the price set for the same by the assize, when such person shall have any loaf in his possession to be sold, more than shall be requisite for the immediate necessary use of his family or his customers, and which it shall be incumbent on such baker or other person complained of to prove before the magistrate or justice to whom such complaint shall be made, if thereunto

Penalty for selling for a greater price than is set by the assize.

required by the party complaining; on pain of forfeiting for every such offence, not more than 40s. nor less than 10s. *f. 26.*

(And by the 2 & 3 Ed. 6. c. 15. If any baker shall conspire not to sell bread but at certain prices; every such person shall forfeit 10 l. for the first offence; and if not paid in six days he shall be imprisoned twenty days, and have only bread and water for his sustenance; for the second offence 20 l. or the pillory; and for the third offence 40 l. or the pillory, and loss of an ear, and to become infamous. And the sessions or leet may hear and determine the same).

Bread inferior to wheaten shall not be sold for a higher price than household.

No person shall sell or offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize; on pain of forfeiting (being convicted thereof by confession, or oath of one witness, before one magistrate or justice) the sum of 20s. *f. 27.*

Houses may be entered to search for bread.

It shall be lawful for any magistrate or justice, or for any peace officer authorized by warrant of such magistrate or justice, at seasonable times in the day-time, to enter into any house, shop, stall, bakehouse, warehouse, or outhouse, of or belonging to any baker or seller of bread, to search for, view, weigh, and try all or any the bread, which shall be there found: And if any bread, on any such search, shall be found to be wanting either in the goodness of the stuff whereof it shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or not truly marked, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate, justice, or peace officer may seize the same; and such magistrate or justice may dispose thereof, as he in his discretion shall think fit, for the better carrying of this act into execution. *f. 28. 32 G. 2. c. 18. f. 2.*

Mills and other places may be entered to search for adulterated meal.

If information shall be given on oath, to any magistrate or justice, that there is reasonable cause to suspect, that any miller who grinds any grain for toll or reward, or any person who doth dress, bolt, or in anywise manufacture any meal or flour for sale, or any maker of bread for sale, doth mix up with or put into any meal or flour ground or manufactured for sale, any mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such meal or flour shall import and ought to be, or whereby the purity of any meal or flour in the possession of any such miller, mealman, or baker shall be
in

in anywise adulterated; it shall be lawful for any such magistrate or justice, and also for any peace officer authorized by the warrant of such magistrate or justice, at all seasonable times in the day-time, to enter in any house, mill, shop, bakehouse, stall, bolting-house, pastry, warehouse, or outhouse, of or belonging to any such miller, mealman, or baker, and to search and examine whether any mixture, ingredient, or thing, not the genuine produce of the grain such meal or flour shall import or ought to be, shall have been mixed up with or put into any meal or flour in the possession of any such miller, mealman or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour shall be in any wise adulterated: And if on such search it shall appear, that any offence hath been committed in any place allowed to be searched as aforesaid; it shall be lawful for any magistrate, justice, or officer, authorized as aforesaid, to seize any meal or flour which shall be deemed on such search to have been adulterated, and all mixtures and ingredients which shall be found and deemed to have been used or intended to be used for such adulteration; and such thereof as shall be seized by such peace officer shall, with all convenient speed, be carried to some magistrate or justice: And if any magistrate or justice, who shall make any seizure in pursuance of this act, or to whom any thing seized shall be brought, shall adjudge that any mixture or ingredients, not the genuine produce of the grain any such meal or flour which shall have been so seized shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized was adulterated by any mixture or ingredient put therein; in such case, every such magistrate or justice is hereby required to dispose of the same, as he in his discretion shall think proper.

31 G. 2. c. 29. s. 29.

Every miller, mealman, baker, or seller of bread as aforesaid, in whose house, mill, shop, bakehouse, stall, bolting-house, pastry, warehouse, outhouse, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there with an intent to have adulterated the purity of meal, flour, or bread, shall on conviction by confession, or oath of one witness before any such magistrate or justice, forfeit not exceeding 10l. nor less than 40s. unless the party charged with such offence shall make it ap-

Penalty of having in possession unlawful ingredients.

pear to the satisfaction of such magistrate or justice, that such mixture or ingredient was not brought or lodged where the same was seized, with design to have been put into any meal or flour, or to have adulterated the purity thereof; but that the same was there for some other lawful purpose. And it shall be lawful for such magistrate or justice, out of the forfeiture when recovered, to cause the offender's name, place of abode, and offence to be published in some news-paper printed or published in or near the county, city, or place, where such offence shall have been committed. *f. 30.*

Penalty of
obstructing
search.

If any person shall obstruct or hinder such search, or the seizure of any bread or ingredients as aforesaid; he shall forfeit not exceeding 5 l. nor less than 20 s. *f. 31.*

Person interested
not to act as
a magistrate.

No person who shall follow or be concerned in the business of a miller, mealman, or baker, shall act as a magistrate or justice in the execution of this act; on pain of 50 l. to him who will inform and sue for the same in any court of record at *Westminster*. *f. 32.*

Journeyman
offending.

If any person who shall follow the trade of a baker, shall make complaint to any magistrate or justice, and make appear to him by the oath of any credible witness, that any offence which he hath been charged with, and for which he shall have paid any penalty by this act, shall have been occasioned by the wilful neglect or default of any journeyman or other servant employed by him; such magistrate or justice shall issue his warrant to bring such journeyman or servant before himself or any magistrate or justice of the place where the offender can be found; and on his being apprehended and brought before such magistrate or justice, the said magistrate or justice shall examine into the matter of such complaint, and on proof thereof upon oath shall under his hand adjudge and order what reasonable sum shall be paid by such journeyman or servant to his master, by way of recompence for the money he shall have paid by reason of the wilful neglect or default of such journeyman or servant. And if he shall neglect or refuse, on conviction, to pay immediately; such magistrate or justice shall commit him to the house of correction, or some other prison, of the place where he shall be apprehended or convicted, to be kept to hard labour not exceeding one calendar month, unless payment thereof shall be made after such commitment, and before the expiration of the said term of one calendar month.

f. 33.

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It shall be lawful for the mayor of *London*, or any Manner of con-
alderman thereof, within the said city or liberties; and victing offenders,
for one justice within the several counties, ridings, divi-
sions, cities, towns corporate, boroughs, liberties, or ju-
risdictions; to hear (A) and determine, in a summary way,
all offences against this act; and for that purpose to sum-
mon (B) before him the party accused; and if he shall not
appear, or offer some reasonable excuse for his default,
then on oath made of the offence by one witness, such
magistrate or justice shall issue his warrant for apprehend-
ing the offender: And on appearance of the party ac-
cused; or if he shall not appear, on notice being given
to or left for him at his usual place of abode; or if he
cannot be apprehended on a warrant granted against him
as aforesaid; such magistrate or justice shall proceed to
inquire of the offence, and to examine any witness or
witnesses who shall be offered on either side upon oath; and
shall convict (C) or acquit the party accused: And if the
penalty, on such conviction, shall not be paid within 24
hours after such conviction; such magistrate or justice
shall issue his warrant directed to any peace officer to make
distress; (D) and if any offender shall convey away his
goods out of the jurisdiction of such magistrate or justice,
or so much thereof that the penalty cannot be levied, then
some magistrate or justice within whose jurisdiction the
offender shall have removed his goods shall back the said
warrant, and thereupon the penalty shall be levied by di-
stress; and if within five days the forfeiture shall not be
paid, the distress shall be appraised and sold, rendering the
overplus after deducting the forfeiture and the costs and
charges of the prosecution, distress and sale; which
charges shall be ascertained by the magistrate or justice
before whom the offender was convicted, or who backed
the warrant, if either of them shall continue alive, and if
not, then by some other magistrate or justice where the
offender was convicted; and for want of such distress,
every such magistrate or justice within whose jurisdiction
such offender shall reside or be, shall on application of the
prosecutor, and proof made of the conviction and non-
payment of the penalty and charges, commit (E) such of-
fender to the common gaol or house of correction of the
division or place where the offender shall be found,
there to remain for one calendar month from the time of
such commitment, unless payment shall be sooner made.

f. 34.

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And

And if it shall be made out on oath, to the satisfaction of any magistrate or justice, that any one is likely to give material evidence on behalf of the prosecutor or of the person accused, and will not voluntarily appear to be examined; such magistrate or justice shall issue his summons to convene such witness before him, at such reasonable time as in such summons shall be fixed: And if any persons so summoned shall neglect or refuse to appear, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath of such summons) such magistrate or justice shall issue his warrant to bring such witness before him; and if on his appearance, or on being brought before such magistrate or justice, he shall refuse to be examined on oath, without offering any just excuse for such refusal, such magistrate or justice may commit him to the public prison of the county, city, or other division, in which the person so refusing to be examined shall be, there to remain not exceeding 14 days, nor less than three, as such magistrate or justice shall direct. *f. 35.*

Form of the conviction.

And the conviction shall be in the form or to the effect following:

—— To wit. *BE it remembered, that on this —— day of —— in the —— year of the reign of —— A. O. is convicted before me one of his majesty's justices of the peace for the said county of —— for —— and I do adjudge him to pay and forfeit for the same the sum of ——.*

Given under my hand and seal the day and year aforesaid.
f. 36.

Application of the forfeitures.

By a general clause in this same act, *f. 34.* All penalties and forfeitures, when recovered, shall be paid to the informer.

But by the 32 G. 2. c. 18. Such of the penalties by the aforesaid act, as thereby are not *particularly* disposed of, shall be one moiety thereof, where any offender shall be convicted by confession, or oath of one witness, to him who shall inform and prosecute; and the other moiety thereof, and also all penalties and forfeitures incurred on the weighing, trying, or seizure of any bread by any magistrate or justice, shall be applied for the better carrying the said act into execution, as such magistrate or justice shall think fit. *f. 2.*

Certiorari.

No certiorari shall be granted, to remove any conviction, or other proceeding had thereupon. 31 G. 2. c. 29. *f. 37.*

If

If any person convicted shall think himself aggrieved, Appeal, he may appeal to the next sessions, and the execution shall in such case be suspended; such person convicted entering into recognizance, at the time of the conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices at the said sessions, who shall finally determine the matter of the said appeal, and award such costs as to them shall appear just and reasonable, to be paid by either party: and if the conviction shall be affirmed, the appellant shall immediately pay down the sum adjudged, together with such costs as the justices in their said sessions shall award; and in default of payment thereof, any two such justices, or any one magistrate or justice having jurisdiction in the place to which such appellant shall escape or where he shall reside, shall commit him to the common gaol of the county, city, division, or place, where he shall be apprehended, until he shall make payment of such penalty and of the costs and charges which shall be adjudged on the conviction, to the informer: But if the appellant shall be discharged, reasonable costs shall be awarded to him against the informer, who would in case of such conviction have been intitled to a share of the penalty; and which costs shall and may be recovered by the appellant against such informer, in like manner as costs given at the sessions are recoverable. *s. 38.*

Provided, that if the conviction shall be within six days before the sessions, the party, on entering into such recognizance as aforesaid, shall be at liberty to appeal, either to the then next, or to the next following sessions. *s. 39.*

Every action which shall be brought against any magistrate, justice or peace officer, for any thing done under this act, shall be commenced within six months, and laid in the proper county; and the act of the 24 G. 2. *Indemnity of persons prosecuted for any thing done on this act.*

c. 44. shall extend to such magistrate or justice acting under this act. And no action shall be commenced against such peace officer, till seven days after notice in writing shall have been given to or left for him at his usual place of abode by the prosecutor's attorney; which notice shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action: and such peace officer may within the said seven days tender satisfaction; and if the

the same is not accepted, the defendant may plead such tender in bar of the action, together with the general issue or any other plea with leave of the court; and if the jury shall find the amends tendred to have been sufficient, or if the plaintiff shall be nonsuit, or discontinue, or judgment be given for the defendant upon demurrer, or if the action be brought after the time limited, or not within the proper county, the jury shall find for the defendant, and he shall be intitled to his costs; but if the jury shall find, that no such tender was made, or not sufficient, or shall find against the defendant on any plea pleaded, they shall give a verdict for the plaintiff, and such damages as they shall think proper, and the plaintiff shall thereupon recover his costs against such defendant.

§. 40.

And other persons sued for any thing done on this act, may plead the general issue; and if they recover shall have treble costs. - §. 41.

Limitation of actions.

Provided always, that no person shall be convicted for any of the aforesaid offences, unless the prosecution be commenced within three days after the offence committed.

§. 42.

Saving of the right of others.

Provided also, that nothing herein shall extend to prejudice any right or custom of the city of *London*; or of the lord of any leet; or clerk of the market; or the dean of *Westminster*, or high steward of *Westminster* or his deputy; or of the universities. §. 43, 44, 45.

Note, the reason why the indemnifying statute of the 24 G. 2. c. 44. is here particularly mentioned, seems to be upon the account of such magistrates or chief officers who are empowered to act in setting the assize, and otherwise carrying this act into execution, that are not justices of the peace; as for instance, the court of mayor and aldermen, in most of the boroughs and towns corporate, consisteth of persons some of whom are not justices; and in others, especially the more ancient, not one of them is a justice of the peace (the corporation having been established before there were any justices of the peace in the kingdom): but yet they are enabled specially to proceed in this and in many other instances by act of parliament. Which observation is applicable also to the power herein given to them, to issue precepts, to examine upon oath, and the like; which power is implied in the general office of a justice of the peace, but is not applicable to those others, without special words granting the same. So also it was necessary for the act to be particular, with regard

regard to the indemnification of constables and others acting under such warrants: as also of the meal weighers, clerks of the market, and others appointed to make returns of the price of grain, flour, and the like, who are not under the general protection of the law for their proceedings in these matters, and therefore require an express declaration in the act itself of their authority and privilege in this respect.

All that hath been said above, as to the price and weight of bread, and the like, proceeds upon the supposition of an assize being set. By the 3 G. 3. c. 11. regulations are made altho' no assize is set, and further provisions are enacted as followeth: Proceedings where the assize hath not been set.

No loaf or loaves of bread, called or deemed assize loaf or loaves in the table of the assize and price of bread in the act of the 31 G. 2. and the weight of which varies according to the variation in the price of grain, shall be made for or exposed to sale, in any place where loaves called prized loaves in the said tables shall be allowed to be sold at the same time; that is to say, no assize loaves of the price of three pence and prized loaves called half quartern loaves, nor assize loaves of the price of six pence and prized loaves called quartern loaves, nor assize loaves of the price of twelve pence and prized loaves called half peck loaves, nor assize loaves of the price of eighteen pence and prized loaves called peck loaves, shall at the same time in any place be made for or exposed to sale, to the end that unwary persons may not be imposed on by buying assize loaves for prized loaves, or prized loaves for assize loaves; on pain that every person offending shall forfeit not exceeding 40s. nor less than 10s. *s. 1.*

And the justices in their general, quarter, or petty sessions, may from time to time appoint, which of the sorts of assize or prized loaves, and what other sorts of bread, and what sorts of grain, shall be allowed to be made and sold within their jurisdiction or any part thereof: their order to be entered in a book, which may be inspected by the makers of bread for sale at all seasonable times of the day without fee; and they shall cause a copy thereof to be put up in some market or other public town of the place, or else be inserted in some public newspaper circulated there.——Provided, that the justices, shall not at any time allow the making for sale or selling any sorts of assize bread made of the flour of wheat, other than wheaten and household bread, and loaves of white bread of the price of two pence or under. *s. 2, 3.*

And

Bread.

And every maker of bread for sale shall observe the same proportion as to weight, as where the assize is set; that is to say, every white loaf of the price of 2 d. or under, shall weigh three parts in four of the weight of the wheaten loaf of the like price; and every wheaten assize loaf, of whatever price the same shall be, shall weigh three parts in four of the weight of every household assize loaf of the like price; and every household assize loaf shall weigh one third part more than a wheaten assize loaf of the like price; on pain of forfeiting not exceeding 40 s. *f. 4.*

And every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale of the flour of wheat, and called *Wheaten Bread*, shall be sold in proportion to each other, as to price; and the like as to loaves of *Household Bread*, which shall be sold proportionably to each other, and for one fourth less than *Wheaten Bread* of the same denomination: on pain of forfeiting for every loaf, not exceeding 40 s. nor less than 10 s. *f. 5.*

And the weight of every sort of bread made for sale shall be in averdepois weight as follows: Every peck loaf, seventeen pounds six ounces; half peck loaf, eight pounds eleven ounces; quarter of a peck loaf, four pounds five ounces and a half; half quarter of a peck loaf, two pounds two ounces and three quarters; on pain of forfeiting for every ounce wanting not exceeding 5 s. nor less than 1 s. and for less than an ounce not exceeding 2 s. 6 d. nor less than 6 d.; so as the same in any city, town corporate, or within the bills of mortality, be brought before a justice and weighed before him within 24 hours after the same shall have been baked or found in any person's custody for sale, and elsewhere within three days;—unless it be made out to the satisfaction of such justice, that the deficiency in weight wholly arose from some unavoidable accident, or was occasioned by some contrivance or confederacy. *f. 6.*

And no person shall sell or offer to sale any bread of an inferior quality to wheat bread, at an higher price than household bread; on pain of forfeiting not exceeding 20 s. *f. 7.*

Every wheaten loaf shall be marked with a large Roman W; household with a large Roman H; and if any person shall sell or offer to sale any such loaf unmarked (except as to such loaves which shall be rasped by the desire of the purchaser for his own use); he shall forfeit for every such loaf, not exceeding 40 s. nor less than 10 s.; unless it shall appear

appear to the satisfaction of the justice to whom complaint shall be made, that the not marking arose from some unavoidable accident, or was occasioned by some contrivance or confederacy. *f. 8.*

And bread made of any other grain than wheat shall be marked with some letter or letters not more than two, as the justices in their general, quarter, or special sessions shall order, which order shall be entered in a book, unto which the bakers may resort in the day time without fee; and the justices shall cause a copy thereof to be put up in some market or other publick town or place within the division, or otherwise to be inserted in some publick newspaper usually circulated there: And if the justices shall neglect to make such order, then the baker shall mark every such loaf with any two distinct capital letters as he shall think fit. And every person who shall make or have in his custody for sale any such loaf made of other grain than wheat, which shall not be so marked, so as the same may on view thereof be ascertained under what denomination it was made (except such loaves as shall be rasped by the desire of the purchaser for his own use); shall forfeit not exceeding 40 s. nor less than 5 s. for every loaf not so marked. *f. 9.*

And it shall be lawful for any justice, or peace officer authorized by warrant of such justice, to enter into any house, shop, stall, bakehouse, warehouse, outhouse, or other place, of or belonging to any baker or seller of bread; and to search, view, weigh, and try all or any bread which shall be there found: And if any bread shall, on any search or trial by any justice, or on proof made before him by the oath of one witness, be found to be deficient in weight, or not truly marked, or deficient in the due baking or working thereof, or wanting in the goodness of the stuff, or made with any mixture of meal or flour of any other grain than the same shall import to be made with, or with any larger or other proportion of any other grain than what ought to be put therein, or with any mixture or ingredient which by the aforesaid act ought not to be put therein, or with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or made with any leaven not allowed by the said former act; such justice or peace officer may seize the same, and dispose thereof to poor persons as to such justice shall seem fit; and the maker or seller, whose bread shall be found wanting in the goodness of the stuff, or made with such undue mixture as aforesaid, or undue proportion,

tion, or made with any thing in lieu of flour which shall not be the genuine flour the same shall import to be, or with any leaven not allowed by the said act, shall forfeit not exceeding 5*l.* nor less than 20*s.*; unless the default shall appear to have wholly arisen from some unavoidable accident, or some contrivance or confederacy.
f. 10.

And if any person shall obstruct or oppose any such search, or seizure of such bread; he shall forfeit not exceeding 40*s.* nor less than 20*s.* *f.* 11.

And no person, who shall follow or be concerned in the business of a miller, mealman, or baker, shall be capable of acting as a justice in the execution of this act; and if he shall presume so to do, he shall forfeit 50*l.* to him who shall inform or sue for the same. *f.* 12.

Provided, that if such baker shall make it appear to any such justice, that any offence for which he shall have paid the penalty, was occasioned by the neglect or default of his journeyman or servant; the said justice shall issue his warrant for bringing such offender before him or some other justice; and, on conviction, such justice shall order what reasonable sum shall be paid by the said offender by way of recompence; and if he do not immediately pay the same, the said justice shall commit him to the house of correction or other prison of the place where he shall be apprehended, there to be kept to hard labour for any time not exceeding one calendar month, unless payment be sooner made. *f.* 13.

And one justice may hear and determine offences in like manner as by the said former act. *f.* 14, 15.

And no certiorari shall be granted, to remove any conviction or other proceedings had thereupon. *f.* 17.

With like liberty of appeal as by the said former act. *f.* 18, 19.

And persons convicted on this act, shall not be prosecuted for the same offence under any other law. *f.* 23.

And all penalties and forfeitures on this act shall go, half to the informer, and half as the justice shall order for carrying this act into execution. *f.* 24.

Finally, it is provided, that nothing herein shall extend to the universities. *f.* 25.

By the 13 G. 3. c. 62. Whereas by the 31 G. 2. c. 29. and 3 G. 3. c. 11. only two sorts of bread made of wheat are allowed to be made for sale, that is to say, Wheaten and Household; and whereas according to the ancient order and custom of the realm there hath been

Concerning
standard wheat-
en bread.

from time immemorial a STANDARD WHEATEN BREAD, being the whole produce of the wheat whereof it was made: it is therefore enacted, that from henceforth a bread made of the flour of wheat, which flour, without any mixture or division, shall be the whole produce of the grain, the bran or hull thereof only excepted, and which shall weigh three fourth parts of the weight of the wheat whereof it shall be made, may be made and sold, and shall be called and understood to be a *standard wheaten bread.* s. 1.

And the maker shall mark every loaf thereof with the capital letters S W, and the same may be made and sold, altho' no affize be set, of the weight and in the proportions following; viz. That every standard wheaten peck loaf shall weigh 17 lb. 6 oz. averdupois; every half peck loaf 8 lb. 11 oz.; and every quartern loaf 4 lb. 5½ oz.: And every peck loaf, half peck loaf, and quartern loaf shall always be sold as to price in proportion to each other respectively: And that when wheaten and household bread made as the law directs, shall be sold at the same time, together with this standard wheaten bread, they be sold in respect of and in proportion to each other as followeth; namely, That the same weight of wheaten bread, which costs 8 d. the same weight of this standard wheaten bread shall cost 7 d. and the same weight of household bread shall cost 6 d. or 7 standard wheaten affized loaves shall weigh equal to 8 wheaten affized loaves, or to 6 household affized loaves of the same price, as near as may be. s. 2.

Provided, that the said standard wheaten bread shall not be made into or exposed to sale as prized loaves, at one and the same time, together with affized loaves of the same standard wheaten bread. s. 3.

And the magistrates may, whenever they think proper, fix the affize of this standard wheaten bread, according to the following tables:

TABLE

T A B L E I.

Or the ASSIZE table of standard wheaten Bread.

The first column contains the price of the bushel of wheat, Winchester measure, from 2 s. 9 d. to 14 s. 6 d. the bushel, the allowance of the magistrates to the baker included: The other columns contain the *weight* of the several loaves.

Price of the bushel of wheat and baking.		Small Bread.						Large Assize Bread.											
		Penny.		Two Pence.		Sixpence.		Twelve Pence.			Eighteen Pence.								
s.	d.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.				
2	9	25	4	3	2	9	9	7	11	18	15	5	28	7	0				
3	0	23	3	2	14	5	8	11	0	17	6	1	26	1	1				
3	3	21	6	2	10	12	8	0	5	16	0	11	24	1	0				
3	6	19	14	2	7	12	7	7	3	14	14	5	22	5	8				
3	9	18	0	2	5	1	6	15	4	13	14	7	20	13	11				
4	0	17	6	2	2	12	6	8	4	13	0	9	19	8	13				
4	3	16	6	2	0	11	6	2	2	12	4	4	18	6	7				
4	6	15	7	1	14	4	5	12	11	11	9	6	17	6	1				
4	9	14	10	1	13	4	5	7	13	10	15	10	16	7	7				
5	0	13	14	1	11	13	5	3	7	10	6	13	15	10	4				
5	3	13	4	1	10	8	4	15	7	9	14	14	14	14	5				
5	6	12	10	1	9	4	4	11	13	9	7	11	14	3	8				
5	9	12	1	1	8	3	4	8	9	9	1	1	13	9	10				
6	0	11	9	1	7	3	4	5	8	8	11	1	13	0	9				
6	3	11	2	1	6	4	4	2	12	8	5	8	12	8	3				
6	6	10	11	1	5	6	4	0	3	8	0	5	12	0	8				
6	9	10	5	1	4	10	3	13	13	7	11	9	11	9	6				
7	0	9	15	1	3	14	3	11	9	7	7	3	11	2	12				
7	3	9	9	1	3	3	3	9	8	7	3	1	10	12	9				
7	6	9	4	1	2	9	3	7	10	6	15	4	10	6	13				
7	9	9	0	1	1	15	3	5	13	6	11	10	10	1	7				
8	0	8	11	1	1	6	3	4	2	6	8	4	9	12	7				
8	3	8	7	1	0	14	3	2	9	6	5	2	9	7	11				
8	6	8	3	1	0	6	3	1	1	6	2	2	9	3	3				
8	9	7	15	0	15	14	2	15	11	5	15	5	8	15	0				
9	0	7	12	0	15	7	2	14	5	5	12	11	8	11	0				
9	3	7	8	0	15	0	2	13	1	5	10	3	8	7	4				

Price of the bushel of wheat and baking.	Small Bread.			Large Afize Bread.		
	Penny.	Two Pence.	Six Pence.	Twelve Pence.	Eighteen Pence.	
	os. dr.	lb. os. dr.	lb. os. dr.	lb. os. dr.	lb. os. dr.	lb. os. dr.
9 6	7 5	0 14 10	2 11 14	5 7 13	8 3 11	
9 9	7 2	0 14 4	2 10 12	5 5 9	8 0 15	
10 0	6 15	0 13 14	2 9 11	5 3 7	7 13 2	
10 3	6 13	0 13 9	2 8 11	5 1 6	7 10 1	
10 6	6 10	0 13 4	2 7 12	4 15 7	7 7 3	
10 9	6 7	0 12 15	2 6 13	4 13 10	7 4 6	
11 0	6 5	0 12 10	2 5 15	4 11 13	7 1 12	
11 3	6 3	0 12 6	2 5 1	4 10 2	6 15 4	
11 6	6 1	0 12 1	2 4 4	4 8 9	6 12 13	
11 9	5 15	0 11 13	2 3 8	4 7 0	6 10 8	
12 0	5 13	0 11 9	2 2 12	4 5 8	6 8 4	
12 3	5 11	0 11 6	2 2 1	4 4 2	6 6 2	
12 6	5 9	0 11 2	2 1 6	4 2 12	6 4 2	
12 9	5 7	0 10 14	2 0 11	4 1 7	6 2 2	
13 0	5 6	0 10 11	2 0 1	4 0 3	6 0 4	
13 3	5 4	0 10 8	1 15 8	3 14 15	5 14 7	
13 6	5 2	0 10 5	1 14 14	3 13 13	5 12 1	
13 9	5 1	0 10 2	1 14 5	3 12 11	5 11 0	
14 0	4 15	0 9 15	1 13 13	3 11 9	5 9 6	
14 3	4 14	0 9 12	1 13 4	3 10 9	5 7 13	
14 6	4 13	0 9 9	1 12 12	3 9 8	5 6 5	

T A B L E II.

Or the PRICE table of standard wheaten bread.

The first column contains the price of the bushel of wheat, allowance to the baker included: The other columns contain the prices of the several loaves.

Price of the bushel of wheat and baking.	Quar- tern Loaf.	Half Peck Loaf.	Peck Loaf.	Price of the bushel of wheat and baking.	Quar- tern Loaf.	Half Peck Loaf.	Peck Loaf.
s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
2 9	0 2 $\frac{1}{2}$	0 5 $\frac{1}{2}$	0 11	8 9	0 8 $\frac{1}{2}$	1 5 $\frac{1}{2}$	2 11
3 0	0 3	0 6	1 0	9 0	0 9	1 6	3 0
3 3	0 3 $\frac{1}{2}$	0 6 $\frac{1}{2}$	1 1	9 3	0 9 $\frac{1}{2}$	1 6 $\frac{1}{2}$	3 1
3 6	0 3 $\frac{3}{4}$	0 7	1 2	9 6	0 9 $\frac{3}{4}$	1 7	3 2
3 9	0 3 $\frac{3}{4}$	0 7 $\frac{1}{2}$	1 3	9 9	0 9 $\frac{3}{4}$	1 7 $\frac{1}{2}$	3 3
4 0	0 4	0 8	1 4	10 0	0 10	1 8	3 4
4 3	0 4 $\frac{1}{2}$	0 8 $\frac{1}{2}$	1 5	10 3	0 10 $\frac{1}{2}$	1 8 $\frac{1}{2}$	3 5
4 6	0 4 $\frac{1}{2}$	0 9	1 6	10 6	0 10 $\frac{1}{2}$	1 9	3 6
4 9	0 4 $\frac{1}{2}$	0 9 $\frac{1}{2}$	1 7	10 9	0 10 $\frac{1}{2}$	1 9 $\frac{1}{2}$	3 7
5 0	0 5	0 10	1 8	11 0	0 11	1 10	3 8
5 3	0 5 $\frac{1}{4}$	0 10 $\frac{1}{2}$	1 9	11 3	0 11 $\frac{1}{4}$	1 10 $\frac{1}{4}$	3 9
5 6	0 5 $\frac{1}{2}$	0 11	1 10	11 6	0 11 $\frac{1}{2}$	1 11	3 10
5 9	0 5 $\frac{3}{4}$	0 11 $\frac{1}{2}$	1 11	11 9	0 11 $\frac{3}{4}$	1 11 $\frac{3}{4}$	3 11
6 0	0 6	1 0	2 0	12 0	1 0	2 0	4 0
6 3	0 6 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 1	12 3	1 0 $\frac{1}{2}$	2 0 $\frac{1}{2}$	4 1
6 6	0 6 $\frac{1}{2}$	1 1	2 2	12 6	1 0 $\frac{1}{2}$	2 1	4 2
6 9	0 6 $\frac{3}{4}$	1 1 $\frac{1}{2}$	2 3	12 9	1 0 $\frac{3}{4}$	2 1 $\frac{1}{2}$	4 3
7 0	0 7	1 2	2 4	13 0	1 1	2 2	4 4
7 3	0 7 $\frac{1}{2}$	1 2 $\frac{1}{2}$	2 5	13 3	1 1 $\frac{1}{2}$	2 2 $\frac{1}{2}$	4 5
7 6	0 7 $\frac{1}{2}$	1 3	2 6	13 6	1 1 $\frac{1}{2}$	2 3	4 6
7 9	0 7 $\frac{3}{4}$	1 3 $\frac{1}{2}$	2 7	13 9	1 1 $\frac{3}{4}$	2 3 $\frac{1}{2}$	4 7
8 0	0 8	1 4	2 8	14 0	1 2	2 4	4 8
8 3	0 8 $\frac{1}{4}$	1 4 $\frac{1}{2}$	2 9	14 3	1 2 $\frac{1}{4}$	2 4 $\frac{1}{4}$	4 9
8 6	0 8 $\frac{1}{2}$	1 5	2 10	14 6	1 2 $\frac{1}{2}$	2 5	4 10

And

And the bakers and sellers of the said standard wheaten bread shall be liable to all the penalties of the former acts: Provided, that if any information be laid against a baker, for making, marking, or exposing to sale any bread purporting to be the standard wheaten bread aforesaid, made of flour, not being the whole produce of the wheat, the bran or hull thereof only excepted, and weighing three fourth parts of the weight of the wheat whereof it was made, and shall prove that he bought the said flour, as and for such flour, of the miller or mealman, naming his name and place of abode; in such case the baker shall be acquitted, and the miller or mealman shall forfeit as in the case of adulterating corn, meal, or flour, by the said act, of 31 G. 2. c. 29. *f.* 5, 6.

And when the magistrates have set the assize of the said standard wheaten bread; they may, if they think proper, omit setting the assize of any other sort of bread. *f.* 7.

And the justices at any general or quarter sessions may prohibit for three months (unless they shall see cause sooner to revoke the prohibition, which they may do at any adjourned quarter sessions or any special sessions) the makers of bread for sale, for making or exposing to sale any other one or more sorts of bread, purporting to be of a superior quality, and sold at a higher price, than the standard wheaten bread aforesaid. Provided, that no such order of prohibition shall take place, until one kalendar month at least after the date of the making thereof. And such order shall be entered by the said justices in a book, to be inspected by the bakers at all reasonable times in the day time without fee. And the justices shall cause a copy of such order to be put up in some market or other publick town within the district, or shall cause the same to be inserted in some publick news paper published within such district. And provided, that the bakers may have an opportunity, whilst the said prohibition is under consideration, of offering to the justices their objections against it. *f.* 8, 9.

Provided also, that nothing herein shall extend to prevent the magistrates or others who have power to set the assize of bread, from allowing (even during the time of such prohibition as aforesaid), if they think fit, any white loaves or wheaten loaves of the price of one penny or two pence to be made and sold, so that they be made, marked, and sold, according to the regulations of the assize table of *f.* 10.

And whereas in many places the inferior classes of people are used to be supplied with bread made of wheat,

of a coarse and cheaper sort than the standard wheaten bread aforesaid; therefore it shall be lawful for the baker, to make and sell such inferior and coarser bread, provided he sells the same at a price under that of household bread, as directed by the said act of 31 G. 2. (altho' nothing in this act extends to setting any affize thereon). But if he sells such inferior or coarser bread by weights and prices whereat the household bread aforesaid is at this time affized; he shall be liable to the same penalties as bakers for any misdemeanor in making and selling any other sort of bread.
f. 11, 12.

Provided always, that nothing herein shall extend to prejudice any right or custom of the city of London, or the dean of the collegiate church of Westminster, or the high steward of the city of Westminster, or either of the two universities. *f. 14, 15, 16, 17.*

A. Information of an undue mixture used in making of bread; on the 31 G. 2. c. 29. *f. 21.*

Westmorland. *B*E it remembred, That this ——— day of ——— in the ——— year of the reign of ——— at ——— in the said county, A. I. yeoman, in his proper person, exhibiteth to me J. P. esquire, one of his majesty's justices of the peace for the said county, a complaint and information, and thereby informeth me, that A. O. late of ——— in the county aforesaid, baker, on the ——— day of ——— [Here specify the time of the offence, that the prosecution may appear to be commenced within three days after the offence committed, according to the 42d section of the aforesaid statute] did put into and use, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, contrary to the form of the statute in such case made and provided; whereby the said A. O. hath forfeited a sum of money not exceeding 10*l.* nor less than 40*s.*; and thereupon the said A. I. prayeth the judgment of me the said justice in that behalf, and that he the said A. I. may have one moiety of the said forfeiture, according to the form of the statute in such case made; and that the said A. O. may be summoned to answer the premises before me the said justice.

B. Summons thereupon.

Westmorland. } To the constable of ———

*W*HEREAS complaint and information hath been exhibited before me J. P. esquire, one of his majesty's justices

justices of the peace for the said county, by A. I. yeoman, that A. O. late of ——— in the county aforesaid, baker, on the ——— day of ——— in the ——— year of the reign of ——— did put into and use, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, contrary to the form of the statute in such case made and provided: These are therefore to require you forthwith to summon the said A. O. to appear before me at ——— on the ——— day of ——— at the hour of ——— in the forenoon of the same day, then and there to answer to the said information: And be you then there, to certify what you shall have done in the premises. Herein fail you not. Given under my hand and seal the ——— day of ——— in the year aforesaid.

If the party shall not appear on such summons, or offer some reasonable excuse for his default; then on oath made of the offence by one witness, such justice shall issue his warrant (*mutatis mutandis*) to apprehend the offender, and bring him before the said justice, to answer the said information.

On the party's appearance; or if he do not appear, then on proof of the summons being given to him or left at his usual place of abode; or if he cannot be apprehended by warrant as aforesaid; the justice may proceed to hear and determine the offence.

C. The form of the conviction, by the words of the statute, shall be as follows:

Westmorland, } *BE it remembred, That on this—— day to wit. } of ——— in the ——— year of the reign of ——— A. O. is convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, for putting into and using, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient: And I do adjudge him to pay and forfeit for the same, the sum of five pounds. Given under my hand and seal the day and year aforesaid.*

D. Warrant of distress, on non-payment of the penalty within 24 hours after his conviction.

Westmorland. { To the constable of ———

FORasmuch as A. O. late of ——— in the county aforesaid, baker, was on the ——— day of ——— duly convicted before me J. P. esquire, one of his majesty's justices of the peace
X 3 *for*

Bread.

for the said county, by the oath of A. W. a credible witness, for that the said A. O. on the — day of — did put into and use, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, against the form of the statute in such case made and provided; by reason whereof, I did adjudge and have adjudged him to pay and forfeit for the said offence the sum of 5*l.* to be distributed as is herein-after mentioned: And whereas it appears to me, that the said sum, or any part thereof, is not yet paid: I do therefore hereby authorize and require you forthwith to make distress of the goods and chattels of him the said A. O. and if within the space of five days next after such distress by you taken, the said sum of 5*l.* shall not be paid, that then you do cause the said goods by you seized to be appraised and sold; rendering the overplus to him the said A. O. after deducting the said sum of 5*l.* and also the costs and charges of the prosecution for the said offence, and of the said distress and sale; which costs and charges I do hereby ascertain at the sum of 30*s.* And out of the said sum of 5*l.* so forfeited as aforesaid, you are to pay one moiety to A. I. yeoman, who informed me of the said offence, and prosecuted to conviction him the said A. O. before me for the same; and the other moiety you are to apply for the better carrying the act of parliament for the due making of bread and for the other purposes therein mentioned into execution, according as I shall hereafter give you directions: And if sufficient distress cannot be had or found whereupon to levy the said sum of 5*l.* as aforesaid, you are hereby required to certify the same to me together with the return of this precept. Herein fail you not. Given under my hand and seal the — day of — in the — year of the reign of —.

Return of the want of distress, indorsed upon the warrant:

Westmorland. I A. C. constable of — in the said county, do hereby certify J. P. esquire, one of his majesty's justices of the peace for the said county, that by virtue of this warrant, I have made diligent search for the goods and chattels of the within mentioned A. O. and that I can find no sufficient goods and chattels of him the said A. O. wherem to levy the within mentioned sum of 5*l.* Witness my hand, the — day of — in the year —.

A. C.

Sworn before me the said justice,
the day and year aforesaid:

J. P.

E. Com-

E. Commitment for want of distress.

Westmorland. } To the constable of ——— in the said
county, and to the keeper of the com-
mon gaol at ——— in the said county.

*F*Orasmuch as A. O. late of ——— in the county aforesaid, baker, was on the ——— day of ——— duly convicted before me J. P. esquire, one of his majesty's justices of the peace for the said county, by the oath of A. W. a credible witness, for that he the said A. O. on the ——— day of ——— did put into and use, in the making of bread to be sold, a preparation or mixture in which allum was an ingredient, against the form of the statute in that case made and provided; by reason whereof I did adjudge him to pay and forfeit for the said offence the sum of 5 l. And whereas on the ——— day of ——— in the year aforesaid, I did issue my warrant to the constable of ——— to levy the said sum of 5 l. by distress of the goods and chattels of him the said A. O. And whereas it appears to me, as well upon the oath of the said constable of ——— as otherwise, that he the said constable of ——— hath used his best endeavours to levy the said sum on the goods and chattels of the said A. O. as aforesaid, but that no sufficient distress can be found whereon to levy the same: Therefore I do hereby command you the said constable of ——— him the said A. O. to apprehend and safely convey to the said common gaol, and him to deliver to the keeper thereof aforesaid, together with this precept: And I do hereby command you the said keeper of the gaol aforesaid, to receive into your custody in the said gaol him the said A. O. and him there safely to keep for the space of one calendar month from the time of this commitment; unless the said sum of 5 l. and the costs and charges of the prosecution which I have ascertained at the sum of ——— shall be sooner paid. Given under my hand and seal the ——— day of ——— in the year aforesaid.

F, G. The like process as above may be for bread deficient in weight; beginning the information, A: B. which is the ground work of the whole, thus:

*T*HAT A. O. late of ——— in the county aforesaid, baker, on the ——— day of ——— in the ——— year of the reign of ——— did expose to sale one loaf of household bread importing to be a two penny loaf, deficient in weight one

Bread.

ounce, according to the offize then and there set for the said bread.

And so in other like cases.

Breaking gaol. See **Prison breaking.**

Breaking open doors. See **Arrest.**

Brewers. See **Cyrese.**

Bribery.

BRIBERY in a strict sense is taken for a great misprison of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine or imprisonment. *1 Haw. c. 67.*

Bricks and Tiles.

Duty on Bricks and Tiles. See **Cyrese.**

*True making
of tiles.*

BY the 17 *Ed. 4. c. 4.* Every person, using the occupation of making of the tile called Plain tile (otherwise called Thak tile), roof tile or cres tile, corner tile, and gutter tile, shall make it good, seasonable, and sufficient, and well whited and annealed.

And the earth, whereof any such tiles shall be made, shall be digged and cast up before *Nov. 1*, next before they shall be made; and stirred and turned before *Feb. 1*, next following; and not wrought before *Mar. 1*, next after: and the same earth, before it be put to making of tile, shall be truly wrought and tried from stones.

And the veins called malin or marle, and chalk, lying commonly in the ground near to the land convenient to make tile, after the digging of the said earth wheteof any such tile shall be made, shall be well severed from the earth of which the tile shall be made.

And every such plain tile so to be made shall be 10½ inches long, 6½ inches broad, and half an inch and half a quarter

a quarter thick:—Roof tile or creas tile, 13 inches long, half an inch and half a quarter thick, with convenient deepness:—Gutter tile and cover tile 10½ inches long, with convenient thickness, breadth, and deepness.

And if any person shall set to sale any such tile otherwise made; he shall forfeit to the buyer double value of the tile, and make fine and ransom at the king's will.—To be recovered by action of debt, with costs. And also the justices of the peace and every of them may hear and determine offences against this act; who shall assess upon the offender no less fine than for every 1000 plain tiles 5 s. for every 100 roof tile 6 s. 8 d. and for every 100 corner or gutter tile 2 s.

And the said justices shall have power to call before them or any of them persons having experience or knowledge in making tile, to search and examine the digging, casting, turning, parting, making, whiring, and annealing aforesaid; and no person shall put any such tile to sale before it be searched, on pain of forfeiture. And if the searcher shall find any persons offending against this act, they shall present the defaulters at the next sessions, which shall be equal to a presentment of 12 men. And the searcher shall have of the tile maker for his labour for every 1000 plain tile searched 1 d. for every 100 roof tile an halfpenny, and for every hundred corner and gutter tile a farthing. Searcher neglecting his duty shall forfeit 10 s.; and the justices may hear and determine the defaults of the searchers, in like manner as of the tile makers.

By the 17 G. 3. c. 42. All bricks made for sale, shall, when burned, be not less than eight inches and an half long, two inches and an half thick, and four inches wide; and all pantiles, not less than thirteen inches and an half long, nine inches and an half wide, and half an inch thick: on pain that the maker shall forfeit 20 s. for every 1000 bricks, and 10 s. for every 1000 pantiles. *f. 1, 2.* [Note, the reason why no provision was made concerning *pantiles*, among the other sorts of tiles, by the above mentioned act of the 17 Ed. 4. is, because *pantiles* are a modern invention; long after the date of that act.]

True making of bricks and pantiles.

And the size of the sieves or screens for sifting or screening sea coal ashes, to be mixed with brick earth in making of bricks, shall not exceed one fourth part of an inch between the meshes. *f. 3.*

All combinations for enhancing the price of bricks or tiles shall be void; and every brick maker or tile maker offending

Combination to enhance the price.

Bricks and Tiles.

offending therein shall forfeit 20 l. and every clerk, agent, or servant, 10 l. ; half to the poor, and half to him who shall sue in six calendar months in one of the courts at *Westminster*. s. 4.

Penalties.

All other penalties and forfeitures, not herein otherwise directed, shall be recovered before one justice, on proof by confession or oath of one witness ; to be levied by distress, and distributed half to the informer, and half to the poor of the parish where the offender dwells : and if sufficient distress shall not be found, or such penalties and forfeitures shall not be forthwith paid, the justice shall commit the offender to the common gaol or house of correction for the place where the matter shall arise, for any time not exceeding two calendar months, unless such penalties and forfeitures, and all reasonable charges, shall be sooner paid. s. 5.

The conviction to be in this form, or to the like effect :

BE it remembered, That on the — day of — in the year of our Lord — A. B. is convicted before me C. D. one of his majesty's justices of the peace for the — of — (specifying the offence, and the time and place when and where the same was committed, as the case shall be). Given under my hand and seal the day and year aforesaid. s. 6.

But no penalty, in respect of the dimensions of bricks or tiles, shall be recovered, unless the information shall be laid within one calendar month after sale or delivery of the brick or tiles. s. 7.

Appeal.

Persons aggrieved may, within four calendar months after the cause of complaint shall have arisen, appeal to the general quarter sessions, giving 21 days notice at the least, in writing, to the person or persons whose acts are complained against ; and within eight days after such notice entring into recognizance before a justice with two sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the court. And the justices at such sessions, on proof of such notice and recognizance, shall hear and determine the appeal in a summary way, and award such costs to the party appealing or appealed against, as they shall think reasonable : And their determination shall be conclusive ; and no order or other proceedings in the premises shall be quashed for want of form, or removed by *certiorari* or other process into any of his majesty's courts of record at *Westminster*. s. 8.

Bridges.

NOTE; This title treateth only of county bridges :
Those which are under the cognizance of the surveyor of the highways, as being repaired by the several parishes or districts, are treated of under the title *Highways*.

- I. Who shall repair.*
- II. Power of the leet to inquire thereof.*
- III. Power of the justices in sessions.*
- IV. Concerning the 300 feet at the end of bridges.*
- V. Indictments of bridges.*
- VI. Charges of repairing.*
- VII. Surveyors of the work.*
- VIII. Manner of repairing.*
- IX. Purchasing lands adjoining.*
- X. Contracting for a term of years.*

I. Who shall repair.

By the great charter, 9 H 3. c. 15. *No town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed.*

And none can be compelled to make new bridges, where never any were before, but by act of parliament. 2 Inst. 701.

By the common law, some persons (spiritual or temporal, corporate or not corporate) are bound to repair bridges by reason of the *tenure* of their lands or tenements; and some by reason of *prescription* only : Repairing by tenure or prescription.

By *tenure*, by reason that they and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same. 2 Inst. 700.

By reason of *prescription* only; but herein there is a diversity between bodies politic or corporate, spiritual or temporal, and natural persons: for the bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. 2 Inst. 700.

If

Bridge built by
a private person
which is after-
wards used by
the public.

If a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription. 2 *Inst.* 701.

And if none are bounden by tenure or prescription at common law, then the whole county or franchise shall repair it. *Id.*

E. 10 G. 3. K. and the Inhabitants of the *West Riding* of the county of *York*. The case was, There was an ancient foot bridge over *Glusburne* beck in the said *West Riding*, and a ford for horses, and another for carriages; being in the king's common highway, leading from *Osley* to *Colne* in the county of *Lancaster*. The inhabitants of *Glusburne* had always repaired the said foot bridge. In the year 1743, the inhabitants of *Glusburne* aforesaid, being desirous of having a bridge for carts and carriages over the said stream, applied for assistance to the sessions for the said *West Riding*; and thereupon the justices ordered the sum of 10 l. to be issued for that purpose, with a proviso, that the same should not be construed to extend to charge the inhabitants of the said *Riding*, in time to come, with the reparation of the said bridge, or any part thereof. In pursuance whereof, the inhabitants of *Glusburne* aforesaid pulled down the ancient foot bridge, and sold the materials thereof, and received the money for the same, and built a bridge, about sixty yards higher up the stream, in the same highway, for foot passengers, horses, carts, and carriages. Which bridge so built was of publick utility and used constantly afterwards by all persons passing that road, till the year 1767, when the same was carried away by a flood. And the question was, Whether the inhabitants of the said *West Riding* were obliged to rebuild the said bridge. And, in behalf of the said *Riding*, a case was cited from 1 *Rolls Abr.* 368. which is as follows: "If a man erects a mill for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects use to go over this as over a common bridge; this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit." But the court were clear and unanimous, and the *Riding* was obliged to repair this new bridge. The inhabitants of the county are of common right bound to repair all publick bridges, because they are for the benefit of the county. By *Magna Charta*, none shall be distrained to make bridges, but such as of old time have been accustomed. The inhabitants of
Glusburne

Glasburne were not bound to *make* or build this new bridge for carts or carriages: Nor are they obliged to *repair* more than they were before bound to repair. And they never were bound to repair a bridge for horses, carts, and carriages. What they were bound by prescription to repair, was only a foot bridge. They have built a quite different bridge in a different place. The case in *Rolt's Abr.* about a mill erected for a person's own benefit is different. There the private emolument continued to the person who erected it: And it was not reasonable for him to make the county contribute to it, whilst the private benefit continued to himself. But this bridge for horses, carts, and carriages was for the common publick utility of the county, and therefore is within the rule; that "if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it." The common law therefore attached upon this bridge, and the county ought to repair it. *Barr. Mansf. 2594. Black. Rep. 685.*

By the 22 H. 8. c. 5. *Whereas in many places, it cannot be known and proved, what hundred, town, parish, person, or body politick ought to repair bridges broken in the highways; in every such case, the said bridges, if they be without a city or town corporate, shall be made by the inhabitants of the county; if within a city or town corporate, then by the inhabitants of such city or town corporate; if part be in one shire, city, or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shire, cities, or towns corporate, shall repair such part as lies within their limits. s. 3.*

Bridges broken in the highways] This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like; the remedy in which case is not by indictment but by action. *2 Inst. 701.*

Within a city or town corporate] It hath been questioned, whether a borough which hath no bridge within it's own limits, be not liable to contribute to the repairs of a county bridge. *1 Haw. 225.*

By the inhabitants] The persons to be charged by this act are comprehended under the word *inhabitants*; which word, being the largest word of the kind, is needful to be explained:

First, although a man be dwelling in an house, in a foreign county, city, or town corporate; yet if he hath lands in his own possession and manurance in the county, city,

Bridges.

city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands in his own possession.

Secondly, If a man dwelleth in a foreign shire, city, or town corporate, and keepeth a house and servants in another shire, city, or town corporate; he is an inhabitant in each shire, city, or town corporate within this statute.

Thirdly, *Ex vi termini*, every person that dwelleth in any shire, city, or town corporate, though he hath but a personal residence, yet he is said in law to be an inhabitant, or a dweller there, as servants, or the like; but this statute extendeth not to them, but to such householders who may be distrained for non-payment: And it would be infinite and impossible, to tax every inhabitant being no householder.

Fourth, Every corporation and body politic, residing in any county, city, or town corporate, or having lands or tenements in any county, city, or town corporate which they keep in their own hands and occupation, are said to be inhabitants there, within the purview of this statute.

Fifthly, An infant, that hath house or lands by descent or purchase, is liable to the publick charge; and so is the husband of a feme covert. *2 Inst. 702.*

A tenant at will of an house, which adjoins to a common bridge, is bound to repair the house, so that the publick be not prejudiced by the want of repair, although he be not bound to repair as to his landlord. *L. Raym. 856.*

The freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. *2 Inst. 705.*

II. Power of the leet to inquire thereof.

Decays of bridges are presentable in the leet, or torn. *2 Inst. 701.*

III. Power of the justices in sessions.

The justices, or four of them at the least (1 Q.), shall have power to inquire, hear and determine in the general session, of all manner of annoyances of bridges broken in the highway, to the damage of the king's liege people, and to make such process and pains upon every presentment against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretions to be necessary and convenient,

convenient, for the speedy amendment of such bridges. 22 H. 8. c. 5. f. 1.

Four of them at the least] If the bridge be within a franchise, which hath not four justices, and a sessions of its own, the justices of the county shall inquire: but if the franchise be a county of itself, and hath not four justices (1 Q.), it is not within this statute, but is left to the remedy which it had at common law. 2 Inst. 702.

And to make process] Where the bridge is in one shire, and the persons or lands which ought to be charged are in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission: and if the annoyance be presented, then to make process into every shire of the realm, against such as ought to repair the same, and to do further in every behalf as they might do, if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is. 22 H. 8. c. 5. f. 5.

As the king's bench usually doth] The presentment at common law, might be before the king's bench, or at the assizes. 2 Inst. 701.

IV. Concerning the 300 foot at the ends of bridges.

Such part and portion of the highways, as well within franchises as without, as lie next adjoining to any ends of any bridges, distant from any of the said ends by the space of 300 foot, shall be made, repaired, and amended as often as need shall require; and the justices, or four of them (1 Q.), shall have power to inquire, hear and determine, in the general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges 300 foot, and to do in every thing concerning the making, repairing, and amending of such highways, in as ample manner as they may do for the making, repairing, and amending of bridges. 22 H. 8. c. 5. f. 9.

V. Indictment of bridges.

No money shall be applied to the repair of bridges, until presentment be made by the grand jury at the assizes or sessions,
of

of their insufficiency, inconvenience, or want of reparation.
12 G. 2. c. 29 s. 13.

An indictment for not repairing a bridge, ought to shew what sort of a bridge it is, whether for carts and carriages, or for horses, or for footmen only. *L. Raym.* 1175.

If a man be indicted for that by reason of the tenure of certain lands he is bound to repair a bridge, it must be alleged where those lands lie. 2 *H. H.* 181.

Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court, for the default of repairs, and shall be put to his remedy at law for a contribution from those, who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature; for bridges being of absolute necessity, are not to lie unrepaired till suits are determined. 1 *Haw.* 221.

If a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands; every one of these alienees being tenants of any parcel, either of the demesnes or services, shall be liable to the whole charge, and are contributory among themselves. And tho' the lord of the manor might, upon the several alienations, agree to discharge those that purchased of him, of such repairs; yet that shall not alter the remedy for the publick, but only bind the lord and those that claim under him. As the whole manor, and every part of it, in the possession of one tenant, was once chargeable with the reparations; so it shall remain, notwithstanding any act of the proprietor; It shall not be in his power to apportion the charge whereby the remedy for publick benefit should be made more difficult, or by alienations to persons unable, to render it, in respect of the parts which should come unto such hands, quite frustrate. 1 *Salk.* 358.

It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said, that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea. 1 *Haw.* 221.

It seemeth, that no inhabitant of a county ought to be a *juror*, for the trial of an issue, whether the county be bound to such repairs or not; and therefore the jury must come from some adjacent county. 1 *Haw.* 222.

And it seemeth that the same objection may lie as to the *justices*, where they are (as it may probably happen) all interested. In which case it seemeth that the trial shall be in the next county. For where an impartial trial cannot be had in the proper county, it shall be tried as near to the same as may be. As in the case of the king and the inhabitants of the county of the city of *Norwich*, concerning a county bridge, the trial was in *Suffolk*. *Burr. Mansf.* 859. 860.

But by a special statute, an inhabitant of the county, in such case, may be a witness. 1 *Ann. st. i. c. 18.*

No fine, issue, penalty, or forfeiture, upon any presentment, or indictment for not repairing bridges, or the highways at the ends of bridges, shall be returned into the exchequer, but shall be paid to the treasurer, to be applied towards the said repairs, and not otherwise. 1 *Ann. st. i. c. 18. s. 4.*

And no presentment or indictment for not repairing bridges, or highways at the ends of bridges, shall be removed by certiorari out of the county into another court. 1 *Ann. st. i. c. 18. s. 5.*

Removed by certiorari] In the case of *K. v. inhabitants of Cumberland*, *H. 35 G. 3.* the chief question was, Whether an indictment for not repairing a bridge could be removed by *certiorari* or not? To shew that it could not, the defendants relied on the above clause; but the prosecutor contended, that it was intended only to prevent defendants removing such presentments or indictments, and did not take away the *certiorari* from the prosecutor.—By *L. Kenyon Ch. J.* the words of this statute are very general; but if in the construction, we were to read them in their full extent, it would introduce a solecism in the law, for in these cases the defendants are the inhabitants of a county; and if the indictment cannot be removed by *certiorari*, &c. suggestion entered on the record that the inhabitants of the county are interested, in order to have the trial elsewhere, the indictment must be tried by the very persons who are parties in the cause. This, I believe, would be an anomalous case in the law of *England*. However this question does not rest on that general observation; if this were a new case, we should consider whether the extensive words of this statute ought not to be narrowed in their construction in order to arrive at that point which is the object of all laws—the

Bridges.

attainment of justice. Now, in support of the construction contended for by the prosecutor, that the statute does not prevent the removal of this indictment, many instances have been furnished of indictments for not repairing bridges having been removed by *certiorari* applied for by the prosecutor; and his lordship cited a number of cases, and said, that on the authority of those cases, the court were of opinion that the *certiorari* was properly issued. *Dunf. and East*, 6 V. 194.

And a *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to return the private act upon which their order is founded. *Dalt.* 504.

E. 4 G. 2. K. and the inhabitants of *Handsworth*. Upon motion to quash a *certiorari* to remove an indictment against the defendants at sessions, for not repairing a bridge; it was insisted, that by the 1 *Ann. c. 18.* the *certiorari* is taken away. To which it was answered, and resolved by the court, that this act extendeth only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of the 5 & 6 *W. c. 11.* hath allowed the granting a *certiorari*. And therefore they refused to quash. *Sir.* 900.

VI. Charges of repairing.

By the 12 *G. 2. c. 29.* The charges of repairing and amending bridges, and highways at the ends of bridges, shall be paid out of the general county rate. *s. 1.*

VII. Surveyors of the work.

The four justices in sessions as aforesaid may appoint two surveyors, with salaries, to see the bridges amended. 22 *H. 8. c. 5. s. 4.*

And this business of surveying the bridges, for the more convenience, is usually annexed by the justices to the office of the high constables; for which they have by this clause power to allow them salaries.

VIII. Manner of repairing.

It seemeth to be clear, that those who are bound to repair bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether
it

it continue in the old channel, or make a new one. 1 *Haw.* 221.

And persons are not trespassers, for entering on any adjoining lands for repairing bridges, or laying thereon the requisite materials. 1 *Haw.* 221.

In the case of *K. v. justices of Glamorganshire*, T. 33 G. 3. *Buller J.* said, "As to the power of justices to change roads, by changing the local situation of a bridge, there certainly are old cases against it, and they were properly decided; because previous to 14 G. 2. c. 33. (below) the sessions had no power to change the situation of bridges; but that act impliedly gives them that power, for it enables them to purchase lands adjoining any county bridge for the more commodious enlarging and convenient rebuilding the same. This therefore impliedly gives them the power of altering the position of the bridge to suit the convenience of the publick." *Durnf. and East*, 5 V. 279.

Changing the
situation of
bridges.

And in the above case of *K. v. inhabitants of Cumberland*, H. 35 G. 3. the court strongly intimated (though no positive opinion was given), that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the publick exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge. And upon that question there cannot be entertained much doubt. *Durnf. and East*, 6 V. 294.

Widening
bridges.

IX. Purchasing lands adjoining.

The justices at their sessions may purchase any parcel of land, adjoining or near to any county bridge, for the more commodious enlarging, or convenient rebuilding the same, not exceeding one acre, to be paid for by the treasurer out of the county rates, by order under the hands and seals of the said justices in their said sessions; which lands so purchased shall be conveyed to such person or persons as the justices in the said sessions shall appoint, in trust, for enlarging or rebuilding the said bridges. 14 G. 2. c. 33.

X. Contracting for a term of years.

By the 12 G. 2. c. 29. s. 14. When any publick bridges, ramparts, banks, or cops, are to be repaired at the expence of the county, the justices at their general or quarter sessions, after presentment made by the grand jury of their want of reparation, may contract with any person

Bridges.

for rebuilding, repairing, and amending the same, for any term not exceeding seven years, at a certain annual sum.

In order to which they shall give publick notice of their intention of contracting with any person, for rebuilding, repairing, and amending the same.

And such contracts shall be made at the most reasonable price which shall be proposed by the contractors; who shall give sufficient security for the due performance thereof, to the clerk of the peace.

And all contracts when agreed to, and all orders relating thereto, shall be entered in a book to be kept by the clerk of the peace for that purpose; who shall keep the same amongst the records of the county, to be inspected by any of the justices at all seasonable times, and by any person employed by any parish or place, contributing to the same without fee.

Indictment for a bridge out of repair.

Westmorland. *BT* the oaths of ——— good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king, and the body of the county aforesaid, it is presented, that a certain common bridge, over the river ——— commonly called ——— bridge, lying and being in the parish of ——— in the county aforesaid, in the king's common highway there, leading from the market town of ——— to the market town of ——— in the said county, altogether and from the time whereof the memory of man is not to the contrary, being a common king's highway for all the lieges and subjects of our said lord the king and of his ancestors, with their horses, carts, and carriages to go, pass, ride, and travel at their pleasure, on the ——— day of ——— in the ——— year of the reign of ——— was, and yet is in great decay, broken, and ruinous; so that the lieges and subjects of our said lord the king, upon and over the said bridge with their horses, carts, and carriages could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nuisance of all the lieges and subjects of our said lord the king, upon and over the same bridge going, passing, riding, and travelling, and against the peace of our said lord the king, his crown and dignity.

And that the inhabitants of the county aforesaid, the common bridge aforesaid (so as aforesaid being in decay) ought to repair and amend, when, and so often as it shall be necessary.

[Or,

Bridges.

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[Or, And that A. O. late of ——— in the said county, gentleman, by reason of his tenure of certain lands lying in the parish of ——— aforesaid, and elsewhere in the said county, ought to make, repair, and amend the said common bridge, as often as and when it shall be necessary.]

Buggery.

BUGGERY (from the *Italian bugarene*, a buggerer, What it is. this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, amongst christians not to be named, committed by carnal knowledge, against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast, 3 Inst. 58.

And by the statute of 25 *H. 8. c. 6.* Buggery committed with mankind or beast is made felony without benefit of clergy. And the justices of the peace may hear and determine the same, as in cases of other felonies. The punishment.

Which said statute making it felony generally, there may be accessaries both before and after. But those that are present, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy. 1 H. H. 670. Principal and accessory.

If the party buggered be within the age of discretion Infants. (which is generally reckoned the age of 14) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 Inst. 59. 1 H. H. 670.

By the articles of the navy (22 *G. 2. c. 33.*), if any Navy. person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy with man or beast; he shall be punished with death by the sentence of a court martial.

And entry.

And entry] It is deemed an entry, when the thief breaketh the house, and his body, and any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, or into a hole of the house which he hath made, of intent to murder or kill; this is an entry and breaking out of the house: but if he doth barely break the house, without any such entry at all, this is no burglary. *3 Inst. 64.*

In the case of *George Gibbons*, at the *Old Bailey* in *June 1752*; *Gibbons* was indicted for burglary in the dwelling house of *John Allen*. It appeared in evidence, that the prisoner in the night time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling house; and putting his hand thro' the hole, took out watches and other things, which hung in the shop within his reach: but no entry was proved, otherwise than by putting his hand thro' the hole. This was held to be burglary, and the prisoner was convicted. *Fest. 107, 8.*

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance, this is burglary in all. *3 Inst. 64.*

What shall be
deemed a man-
sion house.

The mansion house] This includes also churches, and the walls and gates of a walled town. *1 Haw. 103.*

Mr. Hawkins says, all out-buildings, as barns, stables, dairy-houses, adjoining to a house, are looked upon as part thereof; and consequently burglary may be committed in them: but if they be removed at any distance from the house, it seems that it hath not been usual of late to proceed against offences therein as burglaries. *1 Haw. 104.*

And *L. Hale* says more explicitly, the mansion house doth not only include the dwelling house, but also the outhouses that are parcel thereof, as barn, stable, cow-house, dairy-house, if they are parcel of the messuage, tho' they are not under the same roof, or joining contiguous to it; and so, he says it was agreed by all the judges: but if they be no parcel of the messuage, as if a man take a lease of a dwelling house from one, and of a barn from another; or if it be far remote from the dwelling house, and not so near to it as to be reasonably esteemed parcel thereof, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking is not burglary, for it is not a mansion house, nor any part thereof. *1 H. H. 558, 9.*

To

To break and enter a *shop*, not parcel of the mansion house, in which the shopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he, or his servant usually, or often lodge in the shop at night, it is then a mansion house, in which burglary may be committed. 1 *H. H.* 557, 8.

A chamber in one of the inns of court, wherein a person usually lodges; or a lodging in part of a house divided from the rest, and having a door of its own to the street, is properly called a mansion-house. 1 *Hawk. c.* 38. *f.* 13.

And where inmates have several rooms in a house of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. But if the owner inhabit no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein, the apartments of such inmates shall be considered as their respective dwelling-houses. *Leach's Cr. Law.* 84, 85. and cases there cited.

But it is not necessary to make it burglary, that any person be actually in the house, at the very time of the offence committed. 1 *Haw.* 103.

At *Newgate* sessions, in *January* 1750, *John Nutbrown* and *Miles Nutbrown* were indicted for burglary in the dwelling house of one *Mr. Fakney* at *Hackney*, and stealing divers goods. It appeared by *Mr. Fakney's* evidence, that he held this house for a term of years not yet expired, and made use of it as a country house in the summer, his chief residence being in *London*: That about the latter end of the last summer, he removed with his whole family to his house in the city, and brought away a considerable part of his goods: That in *November* last, his house was broke open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed, or kitchen furniture, or any thing else for the accommodation of a family. *Mr. Fakney*, being asked, whether at the time he so disfurnished his house, he had any intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact the prisoners were charged with was sufficiently proved; and was committed about midnight the first of *January* last. The court was of opinion, that the pro-

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prosecutor having left his house, and disurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed his dwelling house, at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary, which they did, but found them guilty of felony in stealing the clock and some other small matters. And they were ordered for transportation.—And the distinction is this: Where the owner quitteth the house, *animus revertendi*, it may still be considered as his mansion house, tho' no person be left in it; many citizens, and some lawyers, do so from a principle of good husbandry, in the summer, or for a long vacation. But there must be an intention of returning, otherwise it will be no burglary. *Fest. 76, 77.*

What shall be
deemed night.

In the night] Lord *Coke* says, as long as the day continues, whereby a man's countenance may be discerned, it is called day; and when darkness comes, and day light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. And this doth aggravate the offence; since the night is the time wherein man is at rest, and wherein beasts run about seeking their prey. Hence in ancient records, the twilight was signified, when it was said, *inter canem & lupum* (between the dog and the wolf); for when the night begins, the dog sleeps, and the wolf seeketh his prey. 3 *Inst.* 63.

At the *Lancaster* Lent assizes 1771; *K. and Waddington*. There was an indictment for burglary, alleging the fact to be committed in the night, but not expressing about what hour it was done. Mr. *J. Gould* held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. He said, that according to the old doctrine, a burglary might be committed at any time between sun setting and sun rising; but that the rule now established is, that it cannot be committed during the *crepusculum*; that therefore it is necessary to specify the *hour*, in order that the fact may appear upon the face of the indictment to be done between the twilight of the evening and that of the morning.

Accordingly, Sir *William Blackstone* says, the better opinion seems to be, that if there be daylight enough, begun or left, to discern a man's face withal, it is no burglary. But this doth not extend to moonlight; for then many midnight burglaries would go unpunished: and besides the malignity of the offence doth not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when
sleep

sleep has disarmed the owner, and rendered his castle as it were defenceless. 4 Black. 224.

With intent to commit felony] There can be no burglary, but where the indictment both expressly alleges, and the verdict also finds, an intention to commit some felony; for if it appear, that the offender meant only to commit a trespass as to beat the party, or the like, he is not guilty of burglary. 1 Haw. 105.

There must be an intent to commit felony.

However it seems the much better opinion, that an intention to commit a rape or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence was a felony at common law; because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 Haw. 105.

Whether the felonious intent be executed or not] Thus they are burglars, who break any house, or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, tho' it is not material of what value.

Where a man commits burglary and at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of the larceny; for they are several offences, tho' committed at the same time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. 2 H. H. 246.

Persons acquitted of burglary may be indicted for larceny.

II. Punishment thereof.

By the 18 El. c. 7. and 3 W. c. 9. Benefit of clergy is taken away in cases of burglary, both from the principal, and the accessory before; but in all cases of burglary, accessories after must have their clergy. 2 H. H. 364. 1 Haw. 357, 358.

But by the 10 G. 3. c. 48. Every person who shall buy or receive any stolen jewel or jewels, or any stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall, in all cases where such jewel or jewels, or gold or silver plate shall have been feloniously stolen, accompanied with a burglary actually committed in stealing the same, be triable as well before conviction of the principal felon whether he be in or out of custody, as after his conviction: and if such person so buying or receiving shall be convicted thereof, he shall be guilty of felony, and transported for 14 years.

III. Reward for convicting a burglar.

Indemnity for
killing him.

It may be observed, in the first place, that it is provided by the 24 H. 8. c. 36. That there shall be no forfeiture of lands or goods, for killing any person that attempts to commit burglary.

But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards for apprehending and convicting him in due course of law; which are as follows:

Charges of con-
victing him to
be reimbursed.

By the 25 G. 2. c. 36. The charges of prosecuting and convicting a burglar, shall be paid by the treasurer of the county where the burglary was committed, on producing to him the order of the court for that purpose, which the clerk of assize, or of the peace, shall make out, for the fee of 1 s. 11.

And also the charges of poor witnesses appearing on their recognizance, by the 27 G. 2. c. 3. on paying 6 d. for the order: except in *Middlesex*, where the said charges shall be paid by the overseers of the poor where the person was apprehended.

And by the 18 G. 3. c. 19. The court, before whom any person hath been tried and convicted, or tried and acquitted, in case it shall appear to the said court that there was a reasonable ground of prosecution, and that the prosecutor had *bona fide* prosecuted, may order the treasurer to pay to such prosecutor such sum as they shall think reasonable, not exceeding the expences he was *bona fide* put unto, making also, if he shall appear to be in poor circumstances, a reasonable allowance for his trouble and loss of time.—And the justices in sessions may lay down or alter from time to time such rules and regulations, as to such costs or charges thereafter to be allowed to any person, as to them shall seem just: which rules and regulations, having received the approbation and signature of one or more of the judges of assize, shall be binding, and not otherwise, on all persons whatsoever, s. 7. 9.

Exemptions
from parish
offices for
taking and con-
victing him.

Every person who shall apprehend any one guilty of burglary and prosecute him to conviction, shall have a certificate without fee, under the hand of the judge, certifying such conviction, and within what parish or place the burglary was committed, and also that such burglar was discovered and taken, or discovered or taken, by the person so discovering or apprehending; and if any dispute arise between several persons so discovering or apprehend-
ing,

ing, the judge shall appoint the certificate into so many shares to be divided among the persons concerned, as to him shall seem just and reasonable :

And if any person shall happen to be slain by such burglar, in endeavouring to apprehend him, the executors or administrators of such person slain shall have the like certificate :

Which certificate shall be inrolled by the clerk of the peace of the county in which it shall be granted ; for which he shall have 1 s. and no more :

And the said certificate shall be once assigned over ; and the original proprietor, or the assignee of the same, shall by virtue thereof be discharged from all manner of parish and ward offices, within the parish and ward where the felony was committed. 10 & 11 W. c. 23.

In the case of the *King and Derbyshire*, T. 1 G. 3. The defendant *John Derbyshire* was indicted at the sessions for refusing to take upon him the office of *constable* for the manor of *Birmingham*. The indictment being removed by certiorari, the cause was tried at *Warwick* assizes, and the jury found specially, that the defendant was a fit person in all respects to be nominated and elected to the office, unless discharged or exempt therefrom by reason of a certificate he had under this act. It appeared that the usage at *Birmingham* had been, annually at the court leet there, for the jury to elect two constables for the manor of *Birmingham* generally, and one constable for the hamlet of *Deritend* (a distinct vill within the said manor) particularly : that the manor of *Birmingham* extends into and comprehends the whole town and parish of *Birmingham*, and also the said hamlet of *Deritend* : that the constables so elected for the said manor of *Birmingham* generally, have jurisdiction and authority, as constables, not only throughout the said town and parish of *Birmingham*, but also within and throughout the said hamlet of *Deritend* : that the constable of *Deritend* is elected out of the inhabitants of *Deritend* only ; and the constable so elected for *Deritend* particularly, and the said constables so elected for the said manor of *Birmingham*, have severally equal and concurrent jurisdiction within the said hamlet of *Deritend*. The question reserved for the opinion of the court was, whether the said *John Derbyshire*, notwithstanding the certificate, is liable to serve the said office. Against him, it was urged, that the discharge by the act is, from all parish and ward offices, within the parish or ward wherein the felony was committed. But the limits of this man's office extend beyond the parish of *Birmingham* ; therefore
this

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this is not a parish office. And there is no such division in this place as a ward; therefore no ward office. But a constable is not a parish officer at all. It was a common law office, before parishes existed; and is as ancient as towns or leets: and a parish is not a common law division, but an ecclesiastical one. On the other hand, it was answered, that he is at least a parish officer (whatever more he may be); because his office extends throughout the whole parish of *Birmingham*. And he is an inhabitant of the parish of *Birmingham*. Therefore, though he be also constable of the manor, which includes the parish; yet he is certainly a parish officer, notwithstanding that greater extent of his jurisdiction or power. By the court: The only question is, whether the constable of the manor of *Birmingham* is a parish officer of the parish of *Birmingham*. This term *parish officer* doth not include every officer exercised in the parish: if it did, it might even take in the office of high sheriff of the county. A parish officer is relative to the parish, and confined to the parish only. A constable of a *parish*, may be called a parish officer; but this man hath a much larger jurisdiction than the parish only; for he hath the jurisdiction over the whole manor, which extends much beyond the parish; and the parish is only a part of that district, over which it is to be exercised. And the act doth not intend the certificate to be a discharge from an office, whereof the functions are to be exercised out of the limits of the parish. This man cannot be esteemed a parish officer, either from the origin of his office, or from the nature, or from the exercise of it. *Burr. Mansf. 1182.*

40 l. for taking
and convicting.

And moreover, as a further reward, every person who shall apprehend any person guilty of burglary, and prosecute him to conviction, shall have a certificate under the hand of the judge, without fee, to be made out and delivered before the end of the assizes, certifying the conviction, and in what parish the burglary was committed, and also that the burglar was taken by the person claiming the reward; and if any dispute shall happen to arise between the persons claiming, the judge shall by the said certificate appoint the same to be paid amongst the parties claiming the same, in such share and proportion as to him shall seem just and reasonable: And on tender of such certificate to the sheriff, and demand made, he shall pay to the person so entitled, the sum of 40 l. without fee or deduction, within one month after such tender and demand, on pain of forfeiting double, with treble costs. *5 Ann. c. 31, 6 G. c. 23. s. 10.*

And

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And if any watchman, or any other person, be killed, in endeavouring to apprehend any such burglar, his executors or administrators shall have a certificate delivered under the hand and seal of the judge, or of the two next justices of the peace, of such person being so killed; which certificate they shall, on sufficient proof before them made, give without fee, whereupon, such executor or administrator shall be entitled to receive the like sum of 40l. in like manner. 5 Ann. c. 31. s. 2.

40l. to the executor of a person killed.

And moreover, if any person, being out of prison, shall commit any burglary, and afterwards discover two or more the like offenders, so as two or more be convicted; he shall have the like reward and allowance of 40l., and also other advantages which are given to persons who shall apprehend and convict any the like offenders; and shall also have the king's pardon for all burglaries, robberies, and felonies (except murder and treason) by him committed before such discovery made; which pardon shall be likewise a good bar to an appeal. s. 4.

40l. and a pardon, for convicting two accomplices.

And the sheriff on producing the certificates, and receipts for the said rewards, may deduct the same on his accounts; and if he have not money in his hands, he shall be repaid out of the treasury, on certificate from the clerk of the pipe. s. 3.

Sheriff how to be repaid.

Or instead of charging the same in his accounts, he may immediately apply to the commissioners of the treasury, who shall forthwith repay the same without fee. 3 G. c. 25. s. 4.

Warrant to apprehend a burglar.

Westmorland. } To the constable of —

FOR AS MUCH as A. I. of — in the county of — yeoman, hath this day made information and complaint upon oath, before me, J. P. esquire one of his majesty's justices of the peace for the said county, that yesterday in the night the dwelling house of him the said A. I. at — aforesaid in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5l., of the goods and chattels of him the said A. I. feloniously and burglariously stolen, taken and carried away from thence; and that he hath just cause to suspect, and doth suspect, that A. O. late of — in the county of — labourer, the said felony and burglary did commit: These are therefore in his said majesty's name to command you, that immediately upon sight hereof you do apprehend the said A. O. and bring him before me to answer

Burglary.

swear the premises, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the ——— day of ——— in the year ———.

Indictment for proper burglary.

Westmorland. *THE* jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— at the hour of one in the night of the same day, with force and arms, at ——— in the county of ——— the dwelling house of A. I. feloniously and burglariously did break and enter, with intent him the said A. I. of his goods in the same dwelling house then being, feloniously and burglariously to spoil and rob, and the same goods feloniously and burglariously to steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Indictment for burglary and larceny.

Westmorland. *THE* jurors for our lord the king upon their oath present, That A. O. late of ——— in the county of ——— labourer, on the ——— day of ——— in the ——— year of the reign of ——— betwixt the hours of ten and eleven in the night of the same day, with force and arms, at ——— in the county of ——— the dwelling house of A. I. feloniously and burglariously did break and enter, and one silver tankard of the value of 5l., of the goods and chattels of him the said A. I. in the same dwelling house then and there feloniously and burglariously did steal, take, and carry away; against the peace of our said lord the king, his crown and dignity.

Burning.

House-burning
at the common
law.

MALICIOUSLY and voluntarily burning the house of another by night or by day, is felony at the common law. 1 Haw. 105.

Maliciously and voluntarily] For if it be done by mischance or negligence, it is no felony. 3 Inst. 67.

Yet if a man maliciously intending only to burn one person's house, happens thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a

felonious

felonious design against one man misseth its aim, and takes effect upon another, it shall have the like construction as if it had been levied against him who suffers by it. 1 *Haw.* 106.

Burning] Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to a part of a house, will amount to felony, if no part of it be burned: but if any part of the house be burnt, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of itself. *Id.*

The house] Not only a mansion-house, and the principal parts thereof, but also any other house, and the out-buildings, as barns and stables adjoining thereto; and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105.

Of another] Mr. *Hawkins* says, A person seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same: Also, that it seems the much stronger opinion, that a man so seised or possessed of a house in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony; but however it is certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the publick which attends it; and the offender may be severely fined, and imprisoned during the king's pleasure, and set on the pillory, and bound to his good behaviour. 1 *Haw.* 106.

And so it was in *Holmes's* case, *M. 10 Cha.* *Holmes* was indicted at *Newgate* sessions, and convicted, for that he, being possessed of a house in *London* for six years, remainder to another for three years, reversion to the corporation of *Haberdashers* in fee, did burn the said house. And the indictment being removed into the king's bench by certiorari, it was held by three justices, against the opinion of *Crake* justice, that it was not felony to burn a house whereof he was in possession by virtue of a lease for years. For they said the burning of a house is not felony, unless it be the house of another. Wherefore he was discharged of the felony. But because it was an exorbitant offence, they ordered, that he should be fined 500 l. to the king, and imprisoned during the king's pleasure; and should stand upon the pillory, with a paper on his head signifying the offence, at *Westminster* and at *Chapel-side*, upon the market day, and in the place where he

Burning.

committed the offence; and should be bound to his good behaviour during life. *Cro. Car.* 376.

In the case of *Elizabeth Harris*, at *Aylesbury*, Lent assizes 1753, before Mr. J. Denison; *Elizabeth Harris*, a girl of 14 years of age, and of sufficient understanding for her years, was indicted for maliciously setting fire to, and burning a dwelling house in the possession of *Edward Stokes*: and *Anne*, the wife of *William Course*, was indicted as an accessory to the felony before the fact. The prisoner *Elizabeth Harris* was the daughter of the prisoner *Anne* by a former husband, *John Harris*. It appeared in evidence at the trial, that *John Harris* died seised of the equity of redemption of this house and of another adjoining to it, subject to a mortgage term for 20 h. And that the equity descended to his eldest son, a child left with other children under the care of their mother the prisoner *Anne*; who was intitled to dower out of these houses, but no dower was ever assigned: That *Anne* having the care of her son and his estate, let these houses to *Edward Stokes* at the rent of 5 l. a year, and received the rent for some time; but having a large family of children, she was obliged to ask relief of the parish where she lived: That she was denied such relief, on account of these houses; the parishioners insisting, that the overseers of the poor should be let into the receipt of the rent before she should be intitled to any parochial relief: That thereupon she frequently declared, she would set the housing on fire, if the parish did not relieve her; that she had young children, whom the parish could not punish, though they might punish her; and she would order the least child she had who could carry a coal of fire, to burn the housing down: And many other declarations of the like kind she made, which discovered an obstinate resolution in her to burn the houses, rather than submit to the terms the parishioners insisted on. It appeared farther, that the prisoner *Elizabeth* set the house on fire by the direction of her mother the prisoner *Anne*, who went from home on purpose to be absent at the time the fact was committed; and that no other house was burnt.—The jury found both the prisoners guilty. But a doubt arising by reason of the interest the prisoner *Anne* had in the house, Mr. J. Denison thought proper to respite judgment, in order to take the opinion of the judges, on the case.—July 2d, 1753, at a meeting of the judges, it was unanimously agreed, that both the prisoners were guilty of felony. The only doubt was, with regard to the interest the prisoner *Anne* had in the house; and it was grounded on:

on the reasoning in *Holmes's* case: For had she had such estate in the house as would have cleared her of the charge of the felony, the prisoner *Elizabeth*, who acted by her directions, could not have been guilty of felony. — But all the judges agreed, that the prisoner *Anne's* title to dower was not such an interest as could bring her within the rule in *Holmes's* case. *Holmes* had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind; and therefore the house might in a limited sense be called *his own*. But in the present case, the possession was in *Edward Stokes*, under a demise from *Anne* in behalf of her son, and subject to a yearly rent which she received. And her title to dower, had *Edward Stokes's* interest been out of the case, did not so much as give her a right of entry, it being a bare right of action. Mr. J. *Denison* said, that he had no doubt upon him from the beginning. But it being a new case, and some of the bar being doubtful, he thought it advisable to take the opinion of the judges. — At the next assizes, judgment of death was pronounced upon both the prisoners; and *Anne* the mother was executed. But *Elizabeth* being young, and acting under her mother's direction, was reprieved, and recommended to mercy on condition of transportation. — It was said in the debate of this case by some of the judges, and not denied by any, that had *Anne* been seized of the freehold and inheritance of the house, and *Stokes* in possession under a lease, it would have been felony in *Anne* to have burnt it: otherwise all tenants and their concerns would be very much at the mercy of their landlords. And the principle the three judges went upon in *Holmes's* case, doth seem to warrant this opinion. They considered the house then under consideration as the property of *Holmes*, as *his own house*, by reason of the estate he had in it under his lease. *Croke* (who differed from them) did not dispute the principle, but argued against the conclusion the other judges drew from it. And if this be so, Mr. J. *Foster* says, he does not see why it may not with strict legal propriety be said of a reversioner, who shall maliciously set fire to houses in the possession of his tenants under leases from himself or his ancestors, that he burned the *houses of another*. The judgment in *Holmes's* case, to say no more of it, was a very merciful judgment. The house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual;

like the person to whom goods are delivered, and the absolute owner thereof, in the case of larceny.—Note, it was stated in this case, that the daughter, who committed the fact at the instigation of the mother, was of the age of 14, and of sufficient discretion. But if the mother had employed, as she threatened she would, the least of her children; then she must have been indicted as the principal, since the child not being of years of discretion was innocent. *Foss.* 113, 349.

By statute:
Burning a dwelling house or corn barn.

By the statutes of 23 *H. 8. c. 1.* and 25 *H. 8. c. 3.* No person who shall be found guilty for wilful burning of any dwelling house, or barn wherein any corn shall be, nor persons abetting, procuring, helping, maintaining, or counselling the same, shall be admitted to the benefit of clergy.

There hath been much learned debate, how far these statutes, which are repealed by 1 *Ed. 6. c. 12.* are revived by 5 & 6 *Ed. c. 10.* But as the same is enacted in effect by other subsequent statutes, it is now not very material.

By the 4 & 5 *P. & M. c. 4.* Every person who shall maliciously command, hire, or counsel any person, wilfully to burn any dwelling house, or any part thereof, or any barn then having corn or grain in the same, shall not have the benefit of his clergy.

But accessaries after shall have their clergy. 1 *H. H.* 573.

Burning a barn or stack of corn, in the northern counties.

Whoever shall wilfully and of malice burn, or cause to be burned, or aid, procure, or consent to the burning of any barn, or stack of corn or grain, within any of the counties of *Cumberland, Northumberland, Westmorland, and Durham,* shall be guilty of felony without benefit of clergy. And justices of the peace in sessions may hear and determine the same. 43 *El. c. 13.*

Burning in the night stacks of corn or hay, barns, houses, kilns.

If any person shall in the night time, maliciously, unlawfully, and willingly burn, or cause to be burned, or destroyed, any ricks or stacks of corn, hay, or grain, barns, or other houses or buildings or kilns; he shall be guilty of felony; but without corruption of blood, or disinheritance of heirs:

And the judges of assize, or three justices of the peace, (1 *Q.*) may determine the same, so that the prosecution be within six months:

And the said justices, on request of the party injured, shall issue their warrant for apprehending all such persons as shall be suspected thereof, and take their examination:

And

And shall cause all others who to them shall seem likely to make discovery, to appear before them, and give information on oath; yet so, as no person to be examined shall be proceeded against for any offence, concerning which he shall be examined as a witness and shall upon his examination make a true discovery:

And if such witness, being duly summoned, shall refuse to appear, or to be examined, they may commit him to the common gaol, till he submit to be examined upon oath:

And they shall issue warrants for summoning jurors:

And if any person, being found guilty (in order to avoid judgment of death, or execution thereupon) shall make his election to be transported, the court shall cause judgment to be entered that he be transported to some of the plantations (to be mentioned in the judgment) for seven years: and if he shall return before the expiration of the term, he shall suffer death as a felon, and as if no such election to be transported had been made by him. 22 & 23 C. 2. c. 7.

By the 9 G. 2. commonly called the Black Act, Burning by the Black Act. (which is inserted more at length under the title *Black Act*;) If any person shall set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; [And by the 10 G. 2. c. 32. s. 6. If any person shall wilfully and maliciously set on fire any mine, pit, or delph of coal or cannel coal: which offence, by s. 4. of this act, is incorporated with the offences in the Black Act] he shall be guilty of felony without benefit of clergy.

But in the case of *K. v. Judd*, who was committed for wilfully and maliciously setting fire to a parcel of unthreshed wheat; the court were of opinion, that as the statute had only made it felony, to set fire to a cock, mow, or stack of corn, the warrant of commitment did not charge the defendant with a felony, and he was therefore admitted to bail. *Durnf. and East*, 2 V. 255.

And the hundred shall be chargeable, as in cases of robbery, for the damages sustained (not exceeding 200l.).

And if any person shall apprehend, or cause to be convicted, any offender, and shall be killed, or wounded so as to lose an eye or the use of a limb in endeavouring to apprehend him; on proof thereof made at the sessions, and on certificate thereof from thence, he shall be entitled to the sum of 50l. to be paid by the sheriff in thirty days, the same to be repaid to him out of the treasury.

Houses burning
not bailable.

Such as be taken for houseburning feloniously done, are not bailable by justices of the peace. 3 *Ed. 1. c. 15.* 2 *Inst. 186.*

Burning a ship.

If any ship officer or mariner shall wilfully burn the ship to which he belongeth, or procure the same to be done, to the prejudice of the owner of the ship or goods, he shall be guilty of felony without benefit of clergy. 1 *Ann. st. 2. c. 9.*

And by the articles of the navy, 22 *G. 2. c. 33.* Every person who shall unlawfully burn or set fire to any magazine, or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial. *Art. 25.*

Burning mills,
or engines be-
longing to
mines.

If any person shall burn or set fire to any wind saw mill, or other wind or water mill, or any of the works belonging thereto; he shall be guilty of felony without benefit of clergy. And if any person shall burn or set fire to any machine or engine belonging to any mine; he shall be guilty of felony, and transported for seven years. 4 *G. 3. c. 29.*

Burning wood
growing.

If any person shall, by day or by night, in a riotous, open, tumultuous, or in a secret and clandestine manner, forcibly, or wrongfully and maliciously, burn any wood, or sprigs of wood, or coppice wood, he shall be guilty of felony. 1 *G. st. 2. c. 48.* 6 *G. c. 16.*

And any two justices, or the justices in sessions, may cause the offender to be apprehended, and hear, and determine and adjudge the offence. 6 *G. c. 16.*

But if the offender is not known, then the person injured shall have satisfaction from the inhabitants of the parishes, towns, or places joining thereon, in the same manner as for dikes and hedges overthrown in the night, by the statute of 13 *Ed. 1. c. 46.* (which enacts, that if it cannot be known by the verdict of assize or jury who did the fact, the towns near adjoining shall be distrained to levy the hedge at their own cost, and to yield damages) unless the offender be by such parish, town, or place, convicted in six months. 6 *G. c. 16.*

Burning ling,
gale, furze, or
fura.

No person shall on any mountains, hills, heaths, moors, forests, chafes, or other wastes, burn between Feb. 2, and June 24, any grig, ling, heath, furze, gale or fern; on pain of being committed to the house of correction for any time not exceeding one month, nor less than ten days, there to be whipt, and kept to hard labour. 4 & 5 *W. c. 23. f. 11.*

If any person shall set fire to, burn, or destroy any **goss, furze, or fern**, in any forest or chase without consent of the owner or person chiefly entrusted with the custody of such forest or chase, or some part thereof, or shall be aiding therein, and being brought before a justice, shall be thereof convicted by confession, or oath of one witness, or on view of the justice, he shall forfeit not exceeding 5 l. nor less than 40 s. half to the informer, and half to the poor; if not forthwith paid, to be levied by distress, and if no sufficient distress can be found, the justice shall commit him to the common gaol for any time not exceeding three months, nor less than one month. 28 G. 2. c. 19. f. 3.

Burning goss, furze or fern, in forests.

If any person shall maliciously, willingly, and unlawfully, burn or cause to be burnt, any wain or cart, laden with coals, or with any goods or merchandizes; or any heap of wood prepared, cut, or felled for making coals, or billets, or talwood; he shall forfeit treble damages to the party grieved, to be recovered by action of trespass: and also 10 l. as a fine to the king. 37 H. 8. c. 6. f. 4.

Burning a laden cart, or fire wood.

If any servant, through negligence or carelessness, shall fire or cause to be fired any dwelling house, or outhouse or houses, and be thereof convicted on the oath of one witness before two justices, he shall forfeit 100 l. to the churchwardens of the parish where the fire shall happen, to be distributed by them to the sufferers, in such proportions as to them shall seem just; and if he do not pay the same immediately on demand to the churchwardens, the said justices shall commit him to some workhouse or house of correction for eighteen months, there to be kept to hard labour. 6 An. c. 31. 14 G. 3. c. 78. f. 84.

Punishment of a servant carelessly firing a house.

By the commission of the peace, any justice may cause to come before him, all those who to any of the people concerning the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards the king and his people; and if they shall refuse to find such security, may cause them to be safely kept in the king's prisons, until they shall find such security.

Threatning to burn a house.

And by the 9 G. c. 22. If any person shall send any letter, without any name subscribed thereto, or signed with a fictitious name, threatening to burn any house, outhouse, barn, stack of corn or grain, hay or straw; he shall be guilty of felony without benefit of clergy.

Burning in the hand of felons. See *Clergy*.
 Burying in Woollen. See *Woollen Manu-
 facture*.

Butcher.

Conspiring to
 raise the price of
 victuals.

IF any butchers shall conspire not to sell their victuals but at certain prices; every such person shall forfeit for the first offence 10*l.* to the king, and if not paid in six days, he shall suffer twenty days imprisonment, and shall only have bread and water for his sustenance; for the second offence 20*l.* in like manner, or the pillory; and for the third offence 40*l.* or pillory, and the loss of an ear, and to be taken as a man infamous, and not to be credited in any matter of judgment. And the sessions or leet may determine the same. 2 & 3 *Ed* 6. 15.

Not to kill in a
 walled town.

No butcher shall slay any beast within any walled town, except *Carlisle* and *Berwick*; on pain of forfeiting for every ox 12*d.* every cow and other beast 8*d.* half to the king, and half to him that will sue. 4 *H.* 7. c. 3.

Selling unwhole-
 some flesh.

A butcher that selleth swines flesh meazled, or flesh dead of the murrain, shall for the first time be grievously amerced, the second time suffer judgment of the pillory, the third time be imprisoned and make fine, and the fourth time forswear the town. Ordinance for bakers, *Hawk. Stat. V.* 1. p. 181.

Not to kill or
 sell on the Lord's
 day.

If any butcher shall kill or sell any victual on the Lord's day, he shall forfeit 6*s.* 8*d.* one third to the informer, and two thirds to the poor, on conviction before one justice, on his own view, or confession, or oath of two witnesses, to be levied by the constable or churchwarden. 3 *C. c.* 1.

Not to water
 hides.

No butcher shall water any hide, except in *June*, *July*, and *August*; on pain of 3*s.* 4*d.* for each offence; one third to the king, one third to the informer, and one third to the town or lord of the liberty, 1 *J. c.* 22. *f.* 2. 50.

And the sessions or leet may hear and determine the same. *f.* 50.

Or, any two justices, near the place, may (in three months after the offence committed) summon the party accused,

accused, and the witnesses; and upon the party's appearance, or contempt in not appearing, on proof of notice given, may examine the witnesses on oath, and give judgment, and issue warrants under their hands to levy the penalty by distress; and, if not redeemed in six days, the same to be sold. They may also mitigate the penalties, so as they reduce them not to less than a fourth part, over and above the costs and charges. And any person aggrieved may appeal to the next sessions, who may finally determine the same; and in case of conviction issue warrants for levying the penalties. 9 An. c. 11. f. 36, 37.

No butcher shall put to sale any hide putrified or rotten; on pain of 3s. 4d. for each offence, in like manner. 17. c. 22. f. 2. Selling rotten hides.

No butcher shall be a tanner or currier; on pain of 6s. 8d. a day, to be recovered and levied in like manner. f. 2, 25. Exercising the trade of a tanner.

If any raw hide shall wilfully or negligently be gashed, in the flaying thereof; or being gashed, be offered to sale by any butcher or other; the offender shall forfeit 2s. 6d. for such hide, and 1s. for a calf skin; half to the poor, and half to the informer: To be levied by two justices in like manner. 9 An. c. 11. f. 11. Gashing hides.

Butter and cheese.

I. Concerning the packing, weight, and goodness of butter.

II. Concerning the shipping of butter and cheese for London.

I. Concerning the packing, weight, and goodness of butter.

EVERY farmer and other person packing up butter for sale, shall set upon every firkin and cask, when the same is fully seasoned in water, a continuing visible mark of the just weight of the empty cask; on pain of forfeiting for every offence the sum of ten shillings for every hundred weight of butter otherwise packed, and so proportionably for a greater or lesser quantity; half to the churchwardens and overseers for the use of the poor, and half with double costs to him who shall sue for the same in sessions, Weight of the cask to be marked.

sessions, by action of debt, indictment, information, or presentment. 13 & 14 C. 2. c. 26. s. 5, 6.

Weight of a pot
to be marked.

Also every potter shall set upon every pot which he shall sell for packing up butter, the just weight of the pot when it is burnt, together with the first letter of his christian name, and his surname at length; on pain of 1 s. And no person shall expose to sale any butter packed up in any pot not so marked, on pain of 2 s. for every such pot. To be recovered and applied in like manner. s. 6.

Weight and
goodness.

Every kilderkin of butter shall contain 112 pounds, and every firkin 56 pounds neat or above: every pound containing 16 ounces, besides the tare of the cask, of good and merchantable butter; and every pot of butter shall contain 14 pounds neat, or above, besides the weight of the pot;

And no butter which is old or corrupt shall be mixed or packed up with any butter which is new and sound;

Nor any whey butter shall be packed or mixed with any butter made of cream;

And every cask or pot of butter shall be of one sort and goodness;

And no butter shall be salted with any great salt, but shall be salted and saved with small salt; nor more salt shall be intermixed with it than shall be needful for its preservation:

On pain that every owner, farmer, or packer of butter, nor putting up in each kilderkin, firkin, and pot to be sold or exposed to sale, such quantities as aforesaid, or offending in false packing as aforesaid, for every offence shall forfeit the value of all the butter so false packed; and for every offence where any kilderkin, firkin, or pot shall be found to contain a lesser quantity of butter than as above, six times the value of every pound of butter that shall be wanting in such cask or pot; to be recovered and applied as aforesaid. s. 2.

Owner to set his
name on the
cask.

And when the farmer or other person hath filled the cask with butter, he shall besides the former mark of the weight of the cask, set also on the cask the first letter of his christian name, and his surname at length with an iron brand; on pain of forfeiting for every offence the sum of 10 s. for every hundred weight of butter otherwise packed, and for more or less proportionably; to be recovered and applied in like manner. s. 5.

Cheefemonger
to deliver due
quantity and
quality.

And every cheefemonger and other who shall sell any kilderkin, firkin, pot, or other cask of butter, shall deliver therein

therein the full quantity and due quality; or shall be liable to make satisfaction, according to the price thereof.

f. 3.

And no cheesemonger or other person shall repack for sale, any butter, in any kilderkin, firkin, or other cask, or pot, on pain of forfeiting double value thereof; to be recovered and applied in like manner. f. 4.

Cheesemonger shall not repack butter.

The prosecution for the offences above, shall be commenced in four months after the sale of the butter.

In what time the prosecution shall be.

f. 7.

But provided nevertheless, that no seller of butter shall be charged with any of the said penalties, after the buyer hath bought the butter and approved it. 4 W.

Prosecution not to be, if the buyer hath approved it.

c. 7. f. 2.

And for preventing any fraud in the seller, after the factor or buyer hath bought the butter, the said factor or buyer shall set his seal, or mark, or name upon it, or upon the cask; and if it shall be afterwards exchanged or opened, and the cask changed, or any bad butter mixed or packed up with good butter, or any other fraud be committed by the seller; and he be convicted thereof, before one justice, by oath of one witness, or confession, he shall forfeit 20 s. for every firkin and offence, to be levied by the constable, by distress, and to be distributed by the justice, half to the churchwardens and overseers for the use of the poor, and half to the informer. f. 3.

Fraud after sale, by the seller.

But any person aggrieved may appeal to the next sessions, giving 10 l. bond to the party, to pay costs (in a month after) if he is not relieved on his appeal. f. 10.

II. Concerning the shipping of butter and cheese for London.

Every warehousekeeper, weigher, searcher, or shipper of butter and cheese, shall receive all butter and cheese that shall be brought to him for the London cheesemongers, and ship the same without undue preference; and shall have for his pains 2 s. 6 d. for every load: and if he shall make default, he shall, on conviction before one justice, on oath of one witness, or confession, forfeit for every firkin of butter 10 s. and for every weigh of cheese 5 s. half to the churchwardens and overseers for the use of the poor, and half to the informer, to be levied by the constable by distress and sale. 4 W. c. 7. f. 4.

No undue preference.

And

Butter and cheese.

Book of entry.

And he shall keep a book of entry of receiving and shipping the goods; on pain of 2s. 6d. for every firkin of butter, and weigh of cheese, to be levied and applied in like manner; and for want of distress, to be committed till paid. *f. 5.*

Master of a ship refusing to take in.

A master of a ship refusing to take in butter or cheese, before he is full laden (except it be a cheesemonger's own ship sent for his own goods), shall forfeit for every firkin of butter refused 5s. and for every weigh of cheese 2s. 6d., to be levied and applied in like manner. *f. 6.*

Appeal.

Person aggrieved by the determination of the justice, may appeal to the next sessions, giving 20l. bond with one or more sureties, to the party, to pay costs (within a month after) if he is not relieved on his appeal. *f. 10.*

Exception.

But this act shall not extend to any warehouse in *Cheshire* or *Lancashire*. *f. 9.*

[Note; There are special directions in the act of 8 G. c. 27. concerning the selling of butter in the city of *York*, and the act of the 17 G. 2. c. 8. concerning the same in *New Malton*; which are not general enough to be here inserted.]

Buttons.

Foreign buttons.

NO person shall sell or offer to sale, or import, any foreign bone lace, cut-work, embroidery, fringe, band strings, buttons, or needle-work, made of thread and silk, or either of them, or any foreign buttons whatsoever; on pain that he who shall offer them to sale shall forfeit the same and 50l. and the importer shall forfeit the same and 100l. half to the king, and half to him that shall sue. 13 & 14 C. 2. c. 13. *f. 2.* 4 W. c. 10. *f. 2.*

And on complaint and information given to a justice of the peace, at times reasonable, he shall issue his warrant to the constable, to enter and search for such manufactures in the shops being open, or warehouses, and dwelling houses of such persons as shall be suspected, and to seize the same. 13 & 14 C. 2. c. 13. *f. 3.* 4 W. c. 10. *f. 3.*

And foreign lace and needle-work condemned, shall not be sold or delivered out of the warehouse wherein the same shall

shall be secured, otherwise than on condition of exportation.

7 G. 3. c. 47. s. 9.

And *English* bone-lace, needle-work, point, or cut work, may be exported custom free. 11 & 12 W. c. 3. s. 15.

No person shall make, sell, or set on any buttons made of wood only, and turned in imitation of other buttons; on pain of 40s. a dozen, half to the king, and half to him that shall sue in any court of record. 10 W. c. 2.

Wooden buttons.

Made of wood only] H. 13 W. King and Roberts. An information was exhibited against the defendant, for having made wooden buttons contrary to the statute. Upon trial, the jury found a special verdict, that all the button was of wood, but there was in it a shank of wire. And after argument, judgment was given for the king, namely, that this was a button of wood, notwithstanding the shank, which is no essential part of buttons; for buttons of silk and hair have no shanks. L. Raym. 712.

By the said act of the 10 W. c. 2. No person shall make, sell, or set on, any buttons made of cloth, serge, drugget, frieze, camlet, or other stuffs of which clothes are usually made, on pain of 40s. a dozen, half to the king, and half to him that shall sue in any court of record.

Cloth buttons.

And by the 8 An. c. 6. No taylor or other person shall make, sell, set on, use, or bind on any clothes, any buttons, or button-holes, made of or used, or bound with serge, drugget, frieze, camlet, or other stuffs of which clothes are usually made; on pain of 5 l. a dozen, half to the king, and half to him that shall sue in any court of record; or on complaint to two justices, they may summon witnesses, and levy the penalty, and return the overplus if any be; and if any person is aggrieved he may appeal to the next sessions.

But by this act no power is given to make distress. The next that occurs, is the statute of 4 G. c. 7. which in the statutes at large is a loose, injudicious, and ungrammatical act, and by its garb may well enough seem to have been drawn up by the tailors or button-makers; whereby it is enacted as follows:

No taylor or other person shall make, sell, set on, or bind on any clothes, any buttons, or button-holes made of, or used, or bound with cloth, serge, drugget, frieze, camlet, or any stuffs that clothes are usually made of (velvet excepted); on pain of 40s. a dozen: To be determined

mined

mined by one justice where the offence shall be discovered, or the offender shall inhabit, on oath of one witness, in three months after the offence committed; and to be distributed (charges of conviction first deducted) half to the informer, and half to the poor of the parish or place where the offence shall be discovered: if not paid (being lawfully demanded) in 14 days after conviction, the justice shall issue his warrant to the constable where the offender dwells, or can be found, to levy it by distress and sale; and where no sufficient distress can be found, he shall be committed to the common gaol of the county or place where he shall be found, to be kept to hard labour for three calendar months. Persons aggrieved may appeal to the sessions, giving sufficient notice; and the sessions may allow costs to the party aggrieved.

And tailors causing their apprentices or servants to make such clothes, shall themselves be subject to the penalties.

And all such clothes, made with such buttons and button-holes, *exposed to sale*, shall be forfeited and seized, and recovered and disposed of as the other penalties.

And by the statute of the 7 G. II. c. 12. No person shall use or wear on any clothes (velvet excepted) any such buttons or button-holes; on pain of 40 s. a dozen, on conviction by confession, or oath of one witness; and any justice of the peace, where the offence shall be committed, or the offender shall inhabit, shall on complaint or information on oath, of any credible person, in one month after the offence, summon the party, and on his appearance or contempt, examine the matter, and on due proof by confession, or oath of one witness, convict the offender, and cause the forfeiture by his warrant to be levied by distress and sale; the said penalties to be half to him on whose oath the party shall be convicted, and half to the poor of the parish where the offence shall be committed. And persons aggrieved may appeal to the next quarter sessions, giving 8 days notice.

To him on whose oath the party shall be convicted.] This is almost the only instance where a share of the penalty is given in express words, in a popular action, to the party on whose oath any person is convicted; and the contrary doctrine seems generally to prevail, that the defendant shall not be condemned upon the sole testimony of the plaintiff swearing for his own interest: And it is certainly against the common law, that such a person should be a witness at all; and therefore his right to give evidence in his

his own cause, and the power to convict the defendant upon that sole evidence, must depend on the express words of some statute.—Not to mention, that here is no disposal of one moiety of the penalty; if the party is convicted by his own confession.

Buying of titles.

- I. By the common law.*
- II. By statute.*

I. By the common law.

IT seemeth to be an high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate: and it seemeth not to be material whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. *1 Idw. 261.*

II. By statute.

1. By the statute of 13 Ed. 1. c. 49. *No person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure.*

2. And by 32 H. 8. c. 9. *None shall buy any pretended right in any land, unless the seller hath been in possession of the same, or of the reversion or remainder thereof, or taken the rents and profits thereof, for one year next before; on pain that the seller shall forfeit the land, and the buyer the value, half to the king, and half to him that shall sue within one year.*
L. a. 6.

Pretences

Buying of titles.

Pretended title] But he who is in lawful possession may purchase the pretended title of any others. 32 H. 8. c. 9. s. 4.

One year before] But no conveyance made by one who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of this statute. 1 Haw. 265.

3. *And the offence of buying of titles may be laid in any county at the pleasure of the informer.* 31 El. c. 5. s. 4.

For other matters relating to buying of titles, See **Maintenance**.

Cabbages; Stealing: The same penalty as for stealing turnips. For which, see the Title **Turnips**.

Callico. See **Curtise**.

Cambricks. See **Linen**.

Candles. See **Curtise**.

Capias. See **Process**.

Cards and Dice.

Importation prohibited.

Duty on cards and dice.

BY the 10 Ann. c. 19. No playing cards or dice shall be imported.

And for every pack of cards, or pair of dice, made in Great Britain, shall be paid the stamp duties following:

	On cards.		Total.		On dice.		Total.	
	d.	s.	d.	s.	d.	s.	d.	s.
By 9 An. c. 23.	6	—	—	—	5	0	—	—
29 G. 2. c. 13.	6	—	—	—	5	0	—	—
16 G. 3. c. 34.	6	—	—	—	2	6	—	—
29 G. 3. c. 30.	6	2	0	—	2	6	15	0

The same to be under the management of the commissioners of the stamp duties.

What shall be deemed dice.

And all pieces of ivory, bone, or other matter, made or used for any play, with any letters, figures, spots, or other marks thereupon, to denote any chance, shall be adjudged

to be dice, and charged with the duties; and if there shall be more than six chances on any one piece, it shall be charged with duty; and if there shall be more than the number of chances usually in a pair of dice, such one piece shall be charged with a further duty proportionate to the number of chances exceeding. 10 *An. c. 19. f. 168.*

And all makers of cards or dice, before they begin to make them, shall give notice in writing of the house or place where they intend to make them to the commissioners or their officer next adjacent, on pain of 50*l.* 9 *An. c. 23. f. 41.* And also all the cards, dice, materials, and utensils shall be forfeited. 10 *An. c. 19. f. 166.*

Places of making to be entered.

And every maker of cards shall send to the commissioners a sufficient quantity of paper, in order to have as many aces of spades impressed thereon as such maker shall desire; and every pack of cards shall have one such ace so impressed: And the commissioners shall cause a stamp to be prepared, with such device as they shall think proper, to denote the said ace of spades, as well in every pack made for use in Great Britain, as in every pack made for exportation; so as in such device there be some distinguishing mark, between cards for home, and cards for foreign consumption. 5 *G. 3. c. 46. f. 9.*

Providing materials.

And the maker shall also send to the commissioners or their officers, jews or wrappers made for inclosing cards for use in Great Britain, with his name and any other particular word or thing printed thereon, as the commissioners shall direct; in order that the same may be stamped and delivered again, from time to time, to such maker, as occasion shall require: And the commissioners shall denote one of the six-penny duties charged on cards in Great Britain, on such jew or wrapper. *f. 10.*

And the officers may enter any house or place where cards or dice are made, sold, or exposed to sale, or suspected to be privately made, or into any publick gaming house, room, or place, and there search and see what quantity of cards or dice shall be making, and whether they be stamped; and if the owner or occupier shall refuse entrance or liberty of search, he shall forfeit 10*l.* 10 *An. c. 19. f. 169.*

Officers may enter and search.

And if the commissioners be informed, or have cause to suspect, that any person makes cards or dice in a place not entered, on affidavit thereof by the informer before a justice of the peace declaring the grounds of his suspicion; the officer may in the day time, and in the presence of a constable, by warrant of such justice break open the door,

Cards and dice.

or any part of such private place, and enter, and seize all such cards, dice, tools, or materials, and if not replevied in five days, they shall be forfeited and sold. 6 G. c. 21. *f.* 59.

Materials not to be removed till finished.

And no materials begun to be wrought for cards or dice, shall be removed until they be completely made, or the duties paid; on pain of double duty. 10 An. c. 19. *f.* 166.

And no maker of cards or dice shall remove the same from the place of making, until such mark upon the dice, and such seal upon the paper and thread inclosing every pack of cards shall be put thereon, as the commissioners shall appoint; on pain of forfeiting the same and treble value. 9 An. c. 23. *f.* 41.

Entry and payment of the duties.

The makers of cards and dice shall once in every 28 days make entry upon oath with the proper officer, of all the cards and dice by them made within the said time; on pain of 20 l. *f.* 42.

And shall once in every six weeks clear off the duties; on pain of double duty. *Id.*

Selling or using unstamped.

And no cards or dice shall be exposed to sale, or used in play in any publick gaming house, unless the paper and thread inclosing the same shall have been respectively sealed and stamped, and unless one of the cards of each pack shall be also stamped on the spotted side; on pain that every person who shall expose to sale any such cards or dice not stamped, shall forfeit for every such pack, and for every one of such dice, 5 l. with full costs. 10 An. c. 19. *f.* 162.

Altering stamps.

If any maker shall use in the making up of any pack of cards, any ace of spades, jew, or wrapper, that has been used before; he shall forfeit 20 l. 5 G. 3. c. 46. *f.* 13.

And if any person shall sell or buy any such ace of spades, jew, or wrapper, in order to be made use of for the inclosing any pack or parcel of cards; he shall forfeit 20 l. And if either the buyer or seller shall inform against the other; his evidence shall be admitted, and he shall be indemnified. *f.* 14, 15.

And if any person shall take off the stamp of any playing cards, or outside paper of any parcel or pack of cards, with intent to use the same again; he shall be guilty of felony, and transported for any time not exceeding seven years. 12 G. 3. c. 48.

Selling waste or second-hand cards.

If any person shall sell any cards called waste cards, unless before sale he mark the back or plain side of every such card, so as to render it unfit to be used in playing; he shall forfeit 20 l. 29 G. 2. c. 13. *f.* 10.

And

And if any person shall sell any cards, by way of second hand cards, in packs or parcels, after the wrapper or cover shall have been broke open, unless before sale he mark the backside of every card so as to render it unfit for play; he shall forfeit 5*l.* for each pack. 16 G. 3. c. 34.

If any person shall counterfeit the stamps on cards or dice, or on any jew, wrapper, or thread inclosing the same; or knowingly sell the same with a counterfeit stamp; or fraudulently use any of the stamps provided by the commissioners; he shall be guilty of felony without benefit of clergy. 10 An. c. 19. f. 163. 29 G. 2. c. 13. f. 5. 5 G. 3. c. 46. f. 10. Counterfeiting stamps.

In the case of exportation, it shall be lawful to remove cards or dice from the place where they are made, without stamping or paying duty, provided that within a month after they are made, and before they be removed, bond of double duty be given, that they shall be exported and not relanded. 10 An. c. 19. f. 170. 5 G. c. 19. f. 48. Exportation.

But cards intended for exportation shall before packing for exportation be inclosed in paper and thread, in packs or parcels, and be marked on the spotted side, in such manner as the commissioners shall direct; and if any person shall sell or expose to sale to be used in Great Britain, or shall use or permit to be used in any publick gaming house, any cards so marked as for exportation; he shall forfeit 20*l.* for every such pack. 29 G. 2. c. 13. f. 6.

And if any person shall reland, or procure to be relanded, any parcel of cards, after having been entered and shipped for exportation; he shall forfeit 50*l.* And if any person concerned shall inform against an accomplice; he shall be admitted to give evidence, and himself be indemnified. 5 G. 3. c. 46. f. 16, 17.

Carriers.

ALL persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coach-men, and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm, for their faults or miscarriages. 1 Bat. Abr. 343.

A a 2

By

Rates for car-
riages.

By the 3 *W. c.* 12. The justices in *Easter* sessions yearly, shall rate prices of all land carriage of goods to be brought *into* any place within their jurisdiction, by any common waggoner or carrier; and shall certify the rates so made to the mayors and other chief officers of the several market towns within their jurisdiction, to be hung up in some publick place to which all persons may resort: And no such common waggoner or carrier shall take for carriage above the rates so set, on pain of 5 l. by distress, by warrant of two justices where such waggoner or carrier shall reside, to the use of the party grieved. *f.* 24.

And by 21 *G. 2. c.* 28. If any common waggoner or carrier shall demand and take any greater price for bringing goods *to* London, or to any place within the bills of mortality, than is allowed and settled by the justices for the place from whence the same are brought for the carrying of goods *from* London to the said place; he shall forfeit 5 l. to the party grieved, to be recovered as by the said act of the 3 *W.* or by distress and sale of his goods by warrant from two justices of *Middlesex, Surry, London, or Westminster.* *f.* 3.

And the clerk of the peace in the country shall, immediately after *Easter* sessions yearly, certify to the lord mayor of *London*, and to the respective clerks of the peace for *Middlesex, Surry, and Westminster*, the rates made for the carriage of goods, in their respective counties and places; which certificate, or an attested copy thereof, signed by the officer to whom the same shall be so transmitted, shall be sufficient evidence of the prices so set. *f.* 3.

[Note; This act of the 21 *G. 2. c.* 28. stands repealed by the 7 *G. 3. c.* 40. except so much thereof as relates to the rate or price for carriage of goods; and the 7 *G. 3. c.* 40. (except so much as repeals the several acts therein mentioned) was repealed by the 13 *G. 3. c.* 44. *f.* 86.]

His name, &c.
to be put on his
carriage.

And by 13 *G. 3. c.* 78. The owner of every waggon, wain, or cart, shall cause to be painted on some conspicuous part thereof, his name and place of abode, in large legible letters, and continue the same thereupon: And the owner of every common stage, waggon, or cart, employed in travelling stages from town to town, shall besides, paint, COMMON STAGE WAGGON or CART, (as the case may be,) on pain of forfeiting not exceeding 5 l. nor less than 20 s. *f.* 60.

A carrier

A carrier shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 *Bac. Abr.* 344.

Refusing to carry goods.

So an action will lie against a common ferryman, who refuseth to carry passengers. *Id.*

But if the porter puts up the box of a passenger behind a stage coach, and the master, as soon as he knows of it, says, he is already full, and refuses to take the charge of it, the master shall not be liable. For this is the same with an host who refuseth his guest, his house being full, and yet the party says he will shift, or the like, if he be robbed, the host is discharged. *Id.*

So a carrier may refuse to admit goods into his warehouse at an unreasonable time, or before he is ready to take his journey; but he cannot refuse to do the duty incumbent upon him by virtue of his publick employment. *L. Raym.* 652.

Refusing to admit goods into his warehouse.

No carrier with any horse or horses, nor waggon-man, carman, or wainman, with their respective carriages, shall, by themselves or any other, travel on the *Lord's* day, on pain of 20 s. on conviction in six months, before one justice (or mayor), on view, or confession, or oath of two witnesses, to be levied by the constable or churchwardens by distress; to the use of the poor, except that the justice may reward the informer with any sum not exceeding a third part. 3 *C. c.* 1.

Carrier travelling on Sundays.

It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious taking; but is liable only to a civil action. 1 *Haw.* 89, 90.

Carrier imbezilling goods.

But it hath been resolved, that if a carrier open a pack, and take out part of the goods, with intent to steal it, he may be guilty of felony; in which case it may be said, not only that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. 1 *Haw.* 90.

Carrier opening a pack.

Also it seems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again

Carrier stealing goods after brought to the place.

again secretly, with intent to steal them, he is guilty of felony; because the possession, which he received from the owner, being determined, his second taking is in all respects the same, as if he were a mere stranger. *Id.*

Carrying to another place.

Also it hath been resolved, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. *Kelynge*, 82.

Carrier robbed.

Where goods are delivered to a carrier, and he is robbed of them, he shall be charged, and answer for them, by reason of the hire; and this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner, that no proof could be had of it. *1 Salk.* 143.

And although it may be thought a hard case, that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconvenience would be far more intolerable, if he were not so, for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. *12 Mod.* 481.

In what cases carriers are accountable in case of fire.

M. 25 G. 3. Forward v. Pitward. This was a special case reserved for the opinion of the court. The defendant was a common carrier, to whom the plaintiff had delivered a parcel of hops, to be carried by the defendant's waggon. The defendant put them into his warehouse, and during the night a fire broke out in the adjoining house, which communicated to, and burned the defendant's warehouse and the plaintiff's goods therein. The question before the court was, whether the plaintiff was entitled to recover.—The case was argued by *Bond* for the plaintiff, and *Burrough* for the defendant.—By *L. Mansfield*. Upon all the cases for one hundred years and more, it is most clear there are events in which the carrier is answerable, tho' not guilty of any neglect. By the nature of the contract, he obliges himself to use all due care and diligence, and is answerable for any neglect. But there is something more imposed upon him by the customs, that is by the common law. *A common carrier is in the nature of an insurer*; all the cases shew him to be so. This makes him liable to every thing except

except the act of God, and the king's enemies, that is, even for inevitable accidents, with those exceptions. The question then is, *what is the act of God?* I consider it to be laid down in opposition to the act of *man*; such as lightnings, storms, tempests, and the like, which could not happen by any human intervention. To prevent litigation and collusion, the law presumes negligence except in these circumstances. An armed force, tho' ever so great and irresistible, does not excuse: The reason is, for fear it may give room for collusion, which can never happen, with respect to the act of God. We all, therefore, are of opinion, that there should be judgment for the plaintiff. *Durnf. and East, 1 V. 27.*

E. 32 G. 3. Garfide v. the Proprietors of the Trent and Mercy Navigation. The declaration stated, that the defendants were common carriers for hire from *Stourport to Manchester*, and that the plaintiff delivered to the defendants four pockets of hops, to be by them taken care of and carried from *Stourport to Manchester*, and to be forwarded from thence to *Stockport* for the plaintiff.—At the trial before Mr. J. *Wilson* it appeared, that the goods were directed to the plaintiff at *Stockport*, and were delivered to the defendants to be carried by them from *Stourport to Manchester*, and arrived safe there on the 30th of *September*, and were that evening put into the defendant's warehouse there; where (together with other goods) they were consumed by an accidental fire that night, and before any carrier came from *Stockport* to whom they could be delivered. It also appeared that, according to the course of business when goods were sent from *Stourport* to go beyond *Manchester*, if any carrier to the place of their destination be at *Manchester* ready to receive them, they are immediately delivered, upon payment of the carriage to *Manchester*, and if not the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered on making the above payment, the defendants charging nothing for keeping the goods in their warehouse.—A verdict was found for the defendants, with liberty to the plaintiff to move to set it aside and to enter up a verdict for him, if this court should be of opinion that the defendants were answerable under these circumstances.—*Bower* accordingly moved to set aside the verdict; contending that the defendants were responsible, as it was a joint contract by them to carry the goods to *Manchester*, and to keep them safe at that place till they could be forwarded to *Stockport*; and that it was for their convey-

nience that the goods were deposited in their warehouse. —The Court refused even a rule to shew cause. —L. Kenyon, Ch. J. said, If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill founded is immaterial here) is, to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches. —Buller, J. The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to *Manchester* is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at *Manchester* to receive these goods that the defendants were obliged to keep them. —Rule refused. *Durnf. and East*, 4 V. 581.

Otherwise losing
or damaging
goods.

And generally, if a man delivers goods to a common carrier, to carry to a certain place; if he loses or damages them, an action upon the case lies against him: for by the custom of the realm, he ought to carry them safely. 1 *Bac. Abr.* 343.

And if he be a common carrier, tho' there be no agreement, or rate settled, or promise of payment; yet he shall recover his hire on a *quantum meruit*, and therefore shall be liable for loss and damages. *Id.*

Also if a person, who is no common carrier, takes upon himself to carry my goods, tho' I promise him no reward, yet if my goods are lost or damaged by his default, I shall have an action against him. *Id.*

For the very taking of the goods is a general consideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show.* 101.

Who shall have
action for goods
lost.

M. 11 G. 3. Davis and James. On an action against a common carrier, the question was, in whose name the action ought to have been brought. The declaration charged, that the plaintiff being possessed of cloth, as of his own proper goods, delivered the same to the defendant to be carried to *London* and delivered to a certain person there. The goods were lost, and the plaintiff obtained a verdict against the carrier. It was moved for a new trial, on the objection, that the action ought to have been brought in the name of the person to whom the

the goods were consigned, and not in the name of the consignor: For the consignor parted with his property upon his delivering the goods to the carrier, and no property remained in him after the delivery. Unto this it was answered, that the question doth not turn upon the strict property. The carrier has nothing to do with the vesting of the property. It does not lie in his mouth to say, that the consignor is not the owner. He is the owner with respect to the carrier, who undertook to him, and was to be paid by him.—*L. Mansfield* said there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases: But it does not enter into the present question. This is an action upon the agreement between the plaintiff and the carrier. The plaintiff was to pay him. Therefore the action is properly brought by the plaintiff, who agreed with him, and was to pay him, *Burr. Mansf.* 2680.

A delivery to the carrier's servant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and lost, an action will lie against the carrier. *Read.* Goods delivered to the carrier's servant.
Car.

At *Bury* assizes, 1732, in the case of *Harvey* against *Syliard* and his wife; the plaintiff brought his action against *Syliard* and his wife, for a box with 80*l.* in it, which was delivered to her as book-keeper for her brother, who was a carrier, in order to be sent by the waggon to London; which 80*l.* was afterwards lost: It was adjudged, that the action would not lie against her, but it ought to have been brought against the brother himself. And the plaintiff was nonsuited. 2 *Barnard.* 234.

If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases the carrier is not liable. *Str.* 145. How far it is necessary that the carrier should know what the goods are.

If a man delivers a box to a carrier to carry, and he asks what is in it, and the man tells him, a book and tobacco (as the case was), and in truth there is 100*l.* besides; yet if the carrier is robbed, he shall answer for the money; for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance. 1 *Bac. Abr.* 345.

But

Carriers.

But if a person, being a common carrier, receives by his book-keeper from another man's servant, two bags of money sealed up, containing as was told him 200*l.* and the book-keeper gives a receipt for his master to this effect, Received of such a one two bags of money sealed up, said to contain 200*l.* which I promise to deliver on such a day at such a place unto such a person, he to pay 10*s.* *per cent.* for carriage and risque; though the bags contain 400*l.* and the carrier is robbed, he shall be answerable only for 200*l.* for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a stage coach, and in the journey the defendant by negligence lost the plaintiff's trunk; upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promised to take care of it, but lost it: *Holt Ch. J.* held, that the master was not chargeable, and that a stage coachman is not within the custom as a carrier is, unless the master makes a distinct price for the carriage of the goods as well as of the persons. 2 *Salk.* 282.

But by the custom and usage of stage coaches, every passenger uses to pay for the carriage of goods above such a weight; and in such case the coachman shall be charged for the loss of goods beyond such weight. *Comyn.* 25.

In the case of *Gibbon and Paynton, E. 9 G. 3.* An action was brought against the *Birmingham* stage coachman, for 100*l.* in money, sent from *Birmingham* to *London* by his coach, and lost. It was hid in hay, in an old nail-bag. The bag and the hay arrived safe; but the money was gone. The coachman had inserted an advertisement in a *Birmingham* news-paper, with a *nota bene*, that the coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried. He had also distributed hand-bills of the same import. It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was three-pence in the pound. The plaintiff was a dealer at *Birmingham*; and had frequently sent

sent goods from thence. It was proved that he had been used, for a year and a half, to read the newspaper in which this advertisement was published; though it could not be proved that he had ever actually read or seen the individual paper wherein it was inserted. A letter of the plaintiff's was also produced, from whence it appeared that he knew the course of this trade, and that money was not carried from that place to London at the common and ordinary price of the carriage of other goods. And the jury found a verdict for the defendant. On behalf of the plaintiff, it was moved for a new trial; and a rule was obtained to shew cause. On shewing cause the court were of opinion that the verdict was right. By the general custom of the realm, a common carrier insures the goods at all events. And it is right and reasonable that he should do so. But he may make a special contract; or he may refuse to contract, in extraordinary cases, but upon extraordinary terms. And certainly, the party undertaking ought to be apprized what it is that he undertakes: and then he will, or at least may, take proper care. But he ought not to be answerable where he is deceived. Here he was deceived: The money was hid in an old nail-bag; and it was concealed from him, that it was money. The true principle of a carrier's being answerable, is the reward. And a higher price ought in conscience to be paid him for the insurance of money and other valuable things, than for insuring common goods of small value.—And the rule was discharged. *Burr. Mansf.* 2298.

Also in the case of *Hutton v. Belton*, E. 22 G. 3. This was an action of assumpsit against the defendant, the owner of a stage coach, for losing a trunk belonging to the plaintiff. Though the loss in point of value was full 50l. the defendant moved for leave to pay 20l. into court, upon an affidavit, stating that he had long since published an advertisement, that he would not be answerable for any parcels committed to his care above the value of 20l. unless he was paid according to the risk; and that tho' the things lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extraordinary for the carriage.—*Erskine* (inter alia) for the plaintiff contended, that unless the demand is for a specific sum, the defendant cannot pay a specific sum into court. And that notice to the public was not sufficient, but must be given to the party, which is mere matter of evidence to the jury.—*L. Mansfield*. The governing principle in cases

cases like the present is, that where the plaintiff makes that kind of demand, which is substantially for a specific sum of money, the defendant may move to pay money into court. In torts indeed it is otherwise, there it is a mere question of damages; a chance, and as in such cases the defendant was originally in the wrong, he must take the event of that chance. In the present case the defendant truly says, "I am by express stipulation liable only for 20l. and am ready to pay it to you." What is the question on the merits? Is it true? If so, he is right; if not, he pays the costs. As to notice of the advertisement, it is open to be tried. Rule absolute. *Caf. by H. Black. [N.] 299.*

And moreover in the case of *Clay v. Willan* and others. *M. 30 G. 3.* The defendants were proprietors of a stage coach, by which the plaintiffs sent a quantity of light guineas from *Wakefield* to *London*. 2 s. were paid for the carriage, and 2 d. for booking. The following were the printed terms on which the defendants performed their business. "*Willan* and Co. humbly beg leave to inform their friends and the public, that cash, plate, jewels, writings, or any such kind of valuable articles, will not be accounted for, if lost, of more than 5 l. value, unless entered as such, and 1 d. insurance paid for each pound value when delivered to the book-keeper or other person in trust, to be conveyed by any carriages that inns at the above inn."—The action was in the usual form against common carriers, and plea, the general issue. No money was paid into court. At the trial the plaintiff was nonsuited, it being proved that the person by whom he sent the parcel to the inn, knew of the above terms, but had not discovered the contents of the parcel to the book-keeper, nor paid for them as valuables. A rule having been granted to shew cause, why the nonsuit should not be set aside and a verdict entered for the plaintiff, on the ground that he was entitled to recover as far as 5 l. by the printed conditions.—The court, after taking time to consider, declared, that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable. Rule discharged. *Caf. by H. Black. 298.*

Carrier may indict for goods stolen, as his own property.

Where goods are stolen from the carrier, he may prefer an indictment against the felon, as for his own goods; for tho' he has not the absolute property, yet he has such a possessory property, that he may maintain an action of trespass against any one who takes them from him, and

so may indict a thief for taking them; and the indictment were good also, if it had been brought by the real owner. *Kelynge*, 39.

And there is a special case, wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. 1 *Haw.* 94.

Person stealing his own goods from the carrier.

E. 1 An. Skinner and Upshaw. The plaintiff brought an action of trover against the defendant who was a common carrier, for goods delivered to him to carry. On not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, and therefore he retained them. And it was ruled by *Holt Ch. J.* at *Guildhall* (before whom the cause was tried) that a carrier may retain the goods for his hire. And on direction, the defendant had a verdict given for him. *L. Raym.* 752.

Carrier may retain goods for his hire.

And even if the goods be stolen goods, yet the right owner shall not have them without paying for the carriage. For the carrier being obliged to receive and carry the goods, the law will not deprive him of the remedy for the reward due for the carriage. *Ibid.* 166.

Carrots.

The penalty for stealing *carrots* is the same as that for stealing *turnips*, *potatoes*, *cabbages*, *parsnips*, and *pease*: which are treated of together under the title *Turnips*.

Carts. See *Highways*.

Carts liable to duties. See *Coaches*.

Casual death. See *Deodand*.

Cattle.

- I. Concerning the bringing of cattle into England.*
- II. Buying and selling of cattle.*
- III. Stealing, killing, or maiming of cattle.*
- IV. Prohibiting the importation of hides, skins, or other parts of cattle, to prevent infection.*

I. Concerning the bringing of cattle into England.

Cattle of the
Isle of Man.

BY the 5 G. 3. c. 43. Bestials may be freely imported from the isle of *Man*.

Scotch cattle.

By the sixth article of the union, no *Scotch* cattle carried into *England*, shall be liable to any other duties, than those to which cattle of *England* are liable. 5 *An.* c. 8.

Irish cattle.

By the 5 G. 3. c. 10. which was of temporary continuance, but by the 16 G. 3. c. 8. made perpetual, all sorts of cattle may be imported from *Ireland* duty free.

II. Buying and selling of cattle.

None shall buy
and sell in the
same market.

No person shall buy any ox, steer, ront, cow, heifer, or calf, and sell the same again alive in the same market or fair; on pain of forfeiting double value, half to the king, and half to him who shall sue. 3 & 4 *Ed.* 6. c. 19. 3 *G.* c. 4. f. 7, 8. And the said act of 3 & 4 *E.* 6. c. 19. is not repealed by the 12 G. 3. c. 71. which repeals the general forestalling, ingrossing, and regrating act of 5 & 6 *Ed.* 6. c. 14. and other subsequent acts enforcing the same; but hath no reference to any preceding act.

III. Stealing, killing, or maiming of cattle.

Killing or
wounding in
the night.

By the 22 & 23 *C.* 2. c. 7. If any person shall in the night time maliciously, unlawfully, and willingly kill or *destray* any horses, sheep, or other cattle, he shall be guilty of felony; but without corruption of blood, or loss of dower: But to avoid judgment of death, or execution thereupon, he may chuse to be transported to some of the plantations to be mentioned in the judgment, for seven years.

And

And if any person shall in the night time maliciously, unlawfully, and willingly *maim, wound, or otherwise hurt* any horses, sheep or other cattle, whereby the same shall not be killed or utterly destroyed; he shall forfeit treble damages, by action of trespass, or upon the case:

And three justices (1 2) may inquire by a jury and witnesses; and may issue warrants for summoning jurors, and for apprehending persons suspected, and take their examinations; and cause witnesses to come before them to give information an oath, so as no person to be examined shall be proceeded against, for any offence concerning which he is examined as a witness, and shall make a true discovery: and if such witness, being summoned, refuse to appear, they may commit him till he submit to be examined on oath.

And by the 14 G. 2. c. 6. and 15 G. 2. c. 34. If any person shall feloniously drive away, or in any other manner feloniously steal any ox, bull, cow, calf, steer, bullock, heifer, sheep, or lamb; or shall wilfully kill any ox, bull, cow, calf, steer, bullock, heifer, sheep, or lamb, with a felonious intent to steal the whole carcass, or any part thereof; or shall assist or aid in committing any such offence, he shall be guilty of felony without benefit of clergy.

Sealing or killing with intent to steal; 10l. reward.

And every person who shall apprehend and prosecute to conviction any offender, shall have 10 l. reward. In order to which he shall have a certificate signed by the judge, before the end of the assizes, certifying the conviction, and where the offence was committed, and that such offender was apprehended and prosecuted by the person claiming the reward; and if there are several claimants, the judge shall in the said certificate direct what share shall be paid to each claimant. Which certificate being tendred to the sheriff, he shall within a month pay the same without deduction; on pain of forfeiting double, with treble costs. The same to be allowed in his accounts, or to be paid to him out of the treasury.

And by the 9 G. c. 22. commonly called the Black Act, which is inserted at large under the title of that name, If any person shall unlawfully and maliciously kill, maim, or wound any cattle, he shall be guilty of felony without benefit of clergy; but without corruption of blood.

Killing or wounding by the Black Act.

Any cattle.] At Abingdon assizes 1770 before Blackstone J. John Paty was convicted for maliciously shooting at and killing one mare of a mixed red and white colour, and one brown stags colt. It was moved in arrest of judgment, that

the

Cattle.

the indictment ought to have averred, that the *mare* and *colt* were *cattle* within the meaning of the (above) act, for that the word *cattle* did not necessarily include horses, mares, and colts.—But the judges were unanimously of opinion, that this statute was an extension of 22 & 23 C. 2. c. 7. and that horses, mares, and colts were included in the word *cattle*. *Leach's Crown Law*, 66.

And the hundred shall be answerable for the damages, not exceeding 200 l.

And if any person shall apprehend, or cause to be convicted, any offender, and shall be killed, or wounded, so as to lose an eye or the use of any limb, in endeavouring to apprehend or secure him; on proof thereof at the sessions, and on certificate thereof from thence, the sheriff shall within thirty days pay to the person intitled the sum of 50 l. to be repaid to him out of the treasury.

IV. Prohibiting the importation of hides, skins, or other parts of cattle, to prevent infection.

It shall be lawful for the king, his heirs or successors, as often as he or they shall find it necessary, by proclamation with the advice of his privy council, or by his order in council, to be published in the *London Gazette*, to prohibit generally, or from any particular country or countries, the importation of any hides or skins, horns or hoofs, or any other part of any cattle or beast, into *Great Britain or Ireland*, for such time, and under such rules, orders, and regulations, as he or they by the advice aforesaid shall judge most expedient and effectual to prevent any contagious distemper from being brought into these kingdoms. 9 G. 3. c. 39.

Certiorari.

Certiorari, what.

A *Certiorari* is an original writ, issuing out of the court of chancery or the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice, before the king or such justices

as he shall assign to determine the cause. 1 *Bac. Abr.*
Certior. A.

Also, the justices of the peace may deliver or send into the king's bench, indictments found before them, or recognizances of the peace taken before them, or force recorded by them, without any *certiorari*. Dalt. c. 195.

What things
may be certified
without a writ
of certiorari.

Concerning which writ of *certiorari*, it is here shewn,

- I. In what cases it is grantable.
- II. How to be granted and allowed.
- III. The effect of it.
- IV. The return of it.

I. In what cases it is grantable.

A *certiorari* lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions erected by act of parliament to have their proceedings returnable in the king's bench. L. Raym. 469, 580.

In cases where
a writ of error
lies not.

And therefore a *certiorari* lies to justices of the peace, even in such cases which they are empowered by statute finally to hear and determine; and the superintendency of the court of king's bench is not taken away without express words. 2 *Haw.* 286.

Where not specially
prohibited
by statute.

But it seems agreed, that a *certiorari* shall never be granted to remove an indictment after a conviction, unless for some special cause; as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

After conviction.

And, *E. 18 G. 2. K. and Nicbolls.* An indictment was removed into the court of king's bench by *certiorari*, after conviction, and before judgment. Upon which a doubt arose, what the court could do, the *certiorari* being brought before judgment; and this court not being apprized of the circumstances of the offence, could not tell what judgment to give: And in *Carth. 6.* it is said, they cannot give judgment. A rule therefore was made to shew cause why the *certiorari* should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute. *Str.* 1227.

And in the case of the *King* against *Gwynne* and others, *H. 32 G. 2.* The court (on a defended motion) granted a *procedendo*, at the instance of the defendants, upon an indictment for an assault at the quarter sessions at *Brecon*, removed into the king's bench by *certiorari*; because the

certiorari had not issued till after the defendants had confessed the assault below; though the conviction was not after a trial, and though several of the justices were sworn to be near relations of Mr. Gwynne one of the defendants, namely, his father, two brothers, and an uncle. *Burr. Mansf.* 749.

After issue
joined.

Also, it seems a good objection against the granting a *certiorari*, that issue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Hqw.* 288.

Where the court
is bound of right
to grant it.

It hath been adjudged, that wherever a *certiorari* is by law grantable for an indictment, the court is bound of right to award it at the instance of the prosecutor, because every indictment is the suit of the king, and he has a prerogative of suing in what court he pleases. But it seems to be agreed that it is left to the discretion of the court, either to grant or deny it at the prayer of the defendant. 2 *Haw.* 287. *Burr. Mansf.* 2456.

M. 28 G. 3. *K. v. Eaton.* Baldwin moved by a *certiorari* to remove a conviction by a justice on 16 G. 3. c. 30. to prevent the stealing of deer. *Erskine* objected, first, that no *certiorari* lay; for by the 23d section it is enacted, that no conviction or judgment should be removed by *certiorari*.—But the court were of opinion, that the result of the several provisions in the act was, that the defendant had an option, either to remove the proceedings from before the justice convicting by *certiorari*, or to appeal to the sessions; that if he had adopted the latter mode, the *certiorari* would have been barred, but not in the former case.—*Erskine* then objected that the defendant ought to lay a ground by affidavit before the court granted a *certiorari*, as that the justice convicting had exceeded his jurisdiction, or had not examined the defendant's witnesses, or the like; for if every defendant were at liberty to remove a conviction of course, this great inconvenience would result from it, that every conviction before a justice would be removed by *certiorari* into this court merely to delay the sentence, and the magistrate, who had only done his duty, would be put to great vexation and expence; and he cited *K. v. Abbot*, *Dougl.* 534.—Baldwin in answer said, that the practice of the court had always been to grant a *certiorari* of course upon the application of either party.—*Buller J.* The language of the court has always been, that the king has a right to remove proceedings by *certiorari* of course, but that where a defendant makes an application of this sort he must always lay a ground for it before the court. Lord *Mansfield* has laid

down this distinction again and again, that on the part of the crown it is a matter of course for the court to grant it; but not so on the part of the defendant. Now if it be not a matter of course to grant such an application as this, it can only be obtained by laying a ground by affidavit: a slight ground indeed may be sufficient, but there must be some, or else what is the consequence? we should have to decide upon every conviction in the kingdom, which would be removed into this court. The two other judges concurred. *Durnf and East*, 2 V. 89.

And it seems that the court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discouragement, and the *certiorari* might delay, if not wholly discourage the prosecution. 2 *Haw.* 287. Not for heinous crimes.

But in extraordinary circumstances the court will sometimes dispense with this rule. As in the case of *K and Fawle*, M. 13 G. The court granted a *certiorari* to remove an indictment for felony found at the quarter-sessions, upon affidavits that the defendant could not have a fair trial there. L. *Raym.* 1452.

And in the case of *K. v. Edward Pryse Lloyd* esquire, T. 23 G. 3. *Buller*, J. said, It is settled in the case of *K. v. Lodiard*, M. 25 G. 3. *Sayer* 6. that a *certiorari* does not lie to remove any other than judicial acts. *Gald.* *Caf.* 309. Nor for other than judicial acts.

II. How to be granted and allowed.

On indictment or presentment: By the 5 *W. c.* 11. and 8 & 9 *W. c.* 33. it is enacted, that in term time, no writ of *certiorari*, at the prosecution of any party indicted, shall be granted out of the king's bench, to remove any indictment or presentment of trespass or misdemeanor, before trial had, from before the justices in sessions; unless such *certiorari* shall be awarded upon motion of counsel, and by rule of court made for the granting thereof. How to be granted on indictment or presentment.

But in the vacation, writs of *certiorari* may be granted by any justice of the king's bench, whose name shall be indorsed on the writ, and also the name of the person at whose instance it is granted.

And all the parties indicted, prosecuting such *certiorari* shall, before the allowance thereof, find two sufficient manucaptors, who shall enter into a recognizance before a justice of the king's bench (who shall indorse the same on the writ), or before a justice

Certiorari.

*justice of the peace of the county or place, in the sum of 20*l.* with condition, at the return of the writ, to appear and plead to the said indictment or presentment, in the said court of king's bench, and at his own costs and charges to cause and procure the issue that shall be joined thereupon, or any plea relating thereto, to be tried at the next assizes for the county wherein the indictment or presentment was found, after such certiorari shall be returned, or the next term if in London, Westminster, or Middlesex, unless the court shall appoint another time, and if so, then at such other time; and to give due notice of such trial, to the prosecutor or his clerk in court; and also that the party prosecuting the writ of certiorari, shall appear from day to day, in the said court of king's bench, and not depart until he shall be discharged by the court.*

And the said recognizance shall be certified into the king's bench, with the certiorari and indictment, to be there filed, and the name of the prosecutor (if he shall be the party grieved), or some publick officer, shall be indorsed on the indictment.

And if the defendant prosecuting the writ of certiorari, be convicted of the offence for which he was indicted, then the court of king's bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice, constable, or other civil officer, who prosecutes on account of any thing that concerned him as officer, to be taxed according to the course of the said court, who shall, for the recovery thereof, within ten days after demand, and refusal of payment, on oath, have an attachment awarded; and the recognizance not to be discharged till the costs are paid.

But if the person procuring the certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound as aforesaid, the justices may proceed to the trial of the indictment in sessions, notwithstanding the writ of certiorari delivered.

At the prosecution of any party indicted] This extends only to certiorari's procured by persons indicted; from whence it follows, that those which are procured by the prosecutor of an indictment, remain as they were at common law. 2 Haw. 292.

To be tried at the next assizes] But the recognizance shall not be forfeited, unless the prosecutor gives rules according to the course of the court. 2 Haw. 293.

Reasonable costs] The master of the crown office, in taxing the costs, ought only to consider those which are subsequent to the certiorari. 2 Haw. 292.

To the prosecutor, if he be the party grieved or injured, or be a justice, constable, or other civil officer] M. 20 G. 2. K. and

and *Ingleton*. The defendant was indicted for attempting to set fire to the house of one *Easton* in *York*, and the indictment also charged that the defendant solicited *Mason*, one of the prosecutors, to help to set fire to the house. *Mason* and one *Glenton* informed the mayor of *York* of this, who bound *Mason* and *Glenton* over to prosecute the defendant. The said defendant removed the indictment by *certiorari* into the court of king's bench, and was thereupon convicted and fined. On payment of the fine, it was moved that the recognizance should be discharged. Unto which it was objected, that the defendant was obliged, before the discharge thereof, to pay the costs of the prosecutors. But by the court, this case is not within the act, for the act extends only to officers and persons really injured, which neither *Glenton* nor *Mason* are, for there was no damage done to the house, but only intended to be done, nor are either of them officers. And the recognizance was discharged. 1 *Wilson* 139.

In a like case, *M. 30 G. 2. K. and Smith*. It was moved, that before the recognizance should be discharged, the prosecutor should have his costs. The objection was that no name of any person, as being either the party grieved or injured, or a publick civil officer, was indorsed upon the indictment. It was answered, That this is not necessary in order to giving costs; that to this purpose it is sufficient, if the prosecutor actually be a civil officer, and of that in the present case there was an affidavit: and the act does not to say, that the prosecutor shall not have his costs, unless his name be indorsed. By the court; it is enough, if it be proved that the prosecutor was such officer, and here it is proved by affidavit. And it was ruled, that the prosecutor should have his costs, before the recognizance should be discharged. *Burr. Mansf. 54.*

T. 27 G. 3. K. v. Sharplefs. Palmer shewed cause against a rule which had been obtained by *Garraw* to discharge the defendant out of custody as to an attachment for non-payment of costs, the term of imprisonment for his offence being expired. The circumstances were, that the prosecutor, Mr. *Pembrake*, being a justice of the peace, had indicted the defendant who was the keeper of the gaol at *St. Alban's*, for suffering a prisoner to escape, who had been committed by him for felony; upon which indictment the defendant had been convicted. He contended, that the prosecutor was entitled to his costs under the 5 & 6 *W. & M. c. 11. s. 3.* as being a publick officer prosecuting

for the benefit of the publick, and cited *K. v. Smith* (a).—*Garraw* in the support of the rule said, that *Mr. Pembroke* had not prosecuted *ex officio*, and therefore did not come within the rule: That as a magistrate he had done his duty when he had committed the felon, and there his jurisdiction had ceased: As for the offence of letting him escape, it was no more the duty of the prosecutor than of any other individual to indict the defendant for it, and cited *K. v. Ingleton* (b).—*Ashburst*, J. In looking into this act of parliament it appears to me that the defendant ought not to be charged with the costs. This is not one of those instances mentioned in the 3d section of the act, which only extends to those officers who prosecute or present *ex officio*, or where the prosecution is carried on by the party aggrieved. If a justice were to present a road, and the same were afterwards turned into an indictment, there the justice would be entitled to costs; or if a justice were to indict a constable or other inferior officer for disobeying his order, in such case also he would be entitled to his costs: But this is not a prosecution carried on by him as a magistrate, for any other person might have indicted the defendant; the offence in this case was such as concerned the general justice of the realm.—*Buller*, J. From a review of all the cases in a *MS.* note book, it appears, that the prosecutor is not entitled to his costs; this book does not indeed include a case from *Basingstoke*, which came before this court a few years ago, but there I understand the prosecution was carried on by the clerk of the peace, whose duty it was to draw up all presentments of constables in form of indictments; and it was there determined that the prosecutor was entitled to costs; but here I cannot say it was the duty of the prosecutor as a justice of the peace to prosecute this defendant; the case originally came before him in the character of a magistrate on the complaint of some other person, and if the justice chose to take the prosecution out of private hands, and to conduct it himself, he cannot be said to prosecute as a magistrate, but like any other individual. The court has always construed this act of parliament as strictly as possible; there was one case indeed on this statute (*K. v. Gater*, *M.* 16 G. 3.), the law of which I doubt, where it was held, that a person who was injured and was really the prosecutrix was not entitled costs, because her name did not appear on the

(a) See last case.

(b) See the case preceding.

back

back of the indictment, altho' it was well known she was the real prosecutrix, but I believe that case has been since over-ruled. In another case afterwards the question was, whether the prosecutor was entitled to the costs of a trial at bar, and it was determined that he was not, because the statute only extended to small offences. These cases shew that the court has always put a strict construction on this act.—Rule absolute. *Durnf. and East*, 2 V. 47.

May proceed to the trial] Nevertheless they must make a return to the *certiorari*, otherwise they will be in contempt to the court; for all writs must be obeyed, unless good cause be shewn to the contrary; and the proper way of shewing it is, to return it. 2 *Haw.* 292.

On a conviction or order: By the 13 G. 2. c. 18. it is enacted, that no *certiorari* shall be granted, to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or the general or quarter sessions, unless it be applied for in six calendar months after such proceedings had or made, and unless it be duly proved upon oath, that the party suing forth the same, hath given six days notice thereof in writing, to the justice or justices, or two of them (if so many there be), before whom such proceedings have been, to the end that such justices, or the parties therein concerned, may shew cause if they so think fit, against issuing the *certiorari*. How to be granted on an order or conviction.

Hath given six days notice thereof, &c.] In the case of *K. v. Justices of Glamorganshire*, it was determined, That before any application for a *certiorari* to remove proceedings before justices of the peace, six days notice thereof in writing must be given to the magistrates previous to the application for the rule to shew cause why such *certiorari* should not be granted. *Durnf. and East*, 5 V. 279.

And by 5 G. 2. c. 19. No such *certiorari* shall be allowed, to remove any such judgment or order, unless the party prosecuting the *certiorari*, before the allowance thereof, enter into a recognizance, with sufficient sureties, before a justice of the county or place, or before the justices at sessions where such judgment or order shall have been given or made, or before a justice of the king's bench, in 50 l., with condition to prosecute the same, at his own costs and charges with effect, without wilful delay, and to pay the party in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs to be taxed according to the course of the court where such confirmation shall be. And if he shall not enter into such recognizance, or shall not perform the conditions, the justices may proceed and make such further order for

the benefit of the party for whom the judgment shall be given, in such manner as if no certiorari had been granted.

The said recognizance to be certified into the king's bench, and there filed, with the certiorari and order or judgment removed thereby.

And if the order or judgment shall be confirmed by the court, the person entitled to the costs, for the recovery thereof, within ten days after demand made, upon oath of such demand and refusal of payment, shall have an attachment granted for the contempt; and the recognizance not to be discharged till the costs are paid and the order complied with.

E. 1 An. A rule was made in the court of king's bench, that no certiorari should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again: but if the time of appeal be expired, that case is not within the rule: By Holt Ch. J.—But afterwards, M. 4 An. in the case of *Shellington*, it was held, that advantage must be taken of this rule upon the motion to file the order; for that after it is filed it is too late. 1 Salk. 147.

But in the case of the borough of *Warwick*, M. 8 G. 2. There was an appeal from a poor rate; and the sessions made an order that the churchwardens should produce the books at an adjourned day; before which, a certiorari was brought to remove that order: And it was held to lie, though the appeal was depending; else the order must be obeyed before the validity of it can be determined. It was also held that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in 1 Salk. 147. extends only to the case where there is a limited time for appealing, as to the next quarter sessions; but the statute of the 43 El. c. 2. is not so restrained: and consequently it can never be said, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no certiorari, till the sessions hath made a determination; and a certiorari brought, pending such appeal, shall be superseded. Str. 991.

III. The effect of it.

Subsequent
proceedings
void.

After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings on the record that is removed by it erroneous. 2 Haw. 293.

But

But it hath been adjudged, that if a *certiorari* for the removal of an indictment before justices of the peace be not delivered, before the jury be sworn for the trial of it, the justices may proceed, 2 *Haw.* 294.

Except where the jury is sworn.

And the justices may set a fine to complete their judgment, after a *certiorari* delivered. L. *Raym.* 1515.

And after judgment.

A *certiorari* removes all things done between the teste and return. L. *Raym.* 835, 1305.

Removes all after the teste of it.

A *certiorari* removes the record itself out of the inferior court; and therefore, if it remove the record against a principal, the accessory cannot there be tried. 2 *Haw.* 325.

Removes the record itself.

And if the defendant be convicted of a capital offence, the person of the defendant must be removed by *habeas corpus*, in order to be present in court, if he will move in arrest of judgment. And herein the case of a conviction differs from that of a special verdict; where the presumption of innocence may be supposed to continue, and therefore the personal presence of the defendant in that case is not necessary at the argument of it. *Burr. Mansf.* 930. K. and Spragg. H. 33 G. 2.

In what case the person of the defendant shall be removed.

It hath been holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or an appearance at sessions, will supersede the obligation of it: but this would be highly inconvenient, and the contrary seems to be supported by the better authority. 2 *Haw.* 292.

How far it supercedes the obligation of a recognizance.

If a *superfedeas* come out of a superior court, to the justices, they ought to surcease, although the *superfedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant to them. *Crom.* 129.

Case where it is awarded against law.

In the case of *K. v. Reason*, T. 35 G. 3. It was determined, that if justices acquit a defendant against whom an information is laid before them for a penalty, this court cannot reverse the judgment, though the justices state (on the return of a *certiorari*) evidence, which *prima facie* is sufficient to convict, and no contradictory or explanatory evidence. And the court said, that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had acquitted the defendant, this court could not substitute themselves in the place of the justices acting as jurymen, and convict him: That they could not judge of the credit due to the witnesses whom they did not hear examined: That they could only look to the form of the conviction,

The court cannot judge of evidence given in the courts below.

and see that the party, if convicted, had been convicted by legal evidence : And that they must consider on this return that the magistrates had determined on the facts, and not on the law of the case as distinguished from the facts. *Dunnis; and East*, 6 V. 375.

IV. The return of it.

Return of the
certiorari.

Every return of a *certiorari* ought to be under seal. 2 *Haw.* 294.

And although the *custos rotularum* keep the records, yet must the justices, to whom it is directed, return the *certiorari*; and therefore, if it is directed to the justices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

The *certiorari* may be sometimes to remove and send up the record itself, and sometimes but only the tenor of the record (as the words therein be), and it must be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.

A return was in paper (and not upon parchment); and for that reason was held by the court not good. 1 *Barnardist.* 113. H. 2 G. 2. K. and the inhabitants of *Darlington*.

Upon a *certiorari* to remove an indictment of a riot, or forcible entry, or the like, the return must have these words, *as also to hear and determine divers felonies, &c.* according to the commission; for if the return mentions only that they are justices of the peace, without such words, the return is insufficient. *Dalt. c.* 195.

If the person to whom a *certiorari* is directed, do make a false return, yet the court will not stay filing it on affidavit of its being false, except in publick cases, as in cases of commissioners of sewers, or for not repairing highways, or for some such special causes; because the remedy for a false return is either an action on the case at the suit of the party grieved, or an information at the suit of the king. *Id.*

If the person to whom the *certiorari* is directed, do not make a return, then an *alias*, that is, a second writ; then a *pluries*, that is, a third writ, or *causam nobis significet*, shall be awarded, and then an attachment. *Crom.* 116.

Besides these general rules, in common to all *certiorari's*, there are many times special directions about granting and allowing or not allowing them, in particular cases, which are treated of under their respective titles; such

Certiorari.

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such as highways, game, tithes, swearing, and many others.

The return of a *certiorari* may be thus :

First, on the backside of the writ indorsed these or the like words :

The execution of this writ appears in a schedule to the same writ annexed.

And that schedule may be thus, on a piece of parchment by itself, and filed to the writ :

Westmorland. I Sir Philip Musgrave, baronet, one of the keepers of the peace and justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, by virtue of this writ to me delivered, do under my seal certify unto his majesty in his court of king's bench, the indictment of which mention is made in the same writ, together with all matters touching the same indictment. In witness whereof I the said Sir P. M. have to these presents set my seal. Given at _____ in the said county, the _____ day of _____ in the _____ year of the reign of _____.

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the *certiorari*.

Challenge. See *Jurors*.

Champerty. See *Maintenance*.

Chance medley. See *Homicide*.

Cheat.

OF cheats punishable by publick prosecution, there are two kinds,

I. *By the common law.*

II. *By statute.*

I. *By*

I. By the common law.

Cheats by the
common law
described.

Cheats, which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Haw.* 188.

It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. *Id.*

So that in those cases, the person aggrieved must bring his action, for the court will not sustain an indictment where one man makes a fool of another. 2 *L. Raymond* 1013.

Counterfeit pass.

A person for a counterfeit pass, was adjudged to the pillory, and fined. *Dalt. c. 32.*

Miller changing
corn.

On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, it was moved to quash the same, because it is only a private cheat, and not of a publick nature. It was answered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimously agreed not to quash it. *T. 16 G. 2. K. and Wood. 1 Sess. C. 217.*

Falsely pretend-
ing to discharge
soldiers.

A person falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the court held the indictment to be good. *T. 3 C. Serlestead's case. 1 Latob. 202.*

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds,

frauds; which in a special case may not be helped civilly, and yet shall be punished criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many persons by taking credit for considerable quantities of goods, and then insists on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl. 100.*

A minor pretending to be of age.

And in the case of *Q. v. Orbell*, it was held to be an indictable offence to get a person to lay money on a race, and to prevail with the party to run booty; for tho' the cheat was private in this particular, yet it was publick in its consequences. *6 Mod. 42.*

Cheating at a race.

Finally, the distinction which, as it seemeth, will solve almost all cases of this kind, was taken in the case of *K. and Wheatly, H. 1 G. 3.* The defendant was indicted and convicted for selling beer short of the due and just measure, to wit, 16 gallons as and for 18. It was moved in arrest of judgment. And by the court, This is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. Offences that are indictable must be such as affect the publick. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so if there is a conspiracy to cheat: For these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries; they are publick offences. But in the present case, it is a mere private imposition or deception. No false weights or measures are used; no conspiracy: Only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance he may bring his action. So the selling an unsound horse for a sound one, is not indictable: The buyer should be more upon his guard. And the distinction which was laid down, as proper to be attended to in all cases of this kind, is this: That in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done to him; but where false weights and measures are used, or false tokens produced, or such methods

Selling beer short of measure.

methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against; there it is an offence indictable. *Barr. Mansf. 1125; Blackst. Rep. 273.*

Punishment.

Some of the above offences are punishable not only by fine and imprisonment, but further with other infamous punishment; (as in *Leeson's* case, who was three times set on the pillory for cheating with false dice. *Croke Ja. 497.*) Others are punishable by fine and imprisonment only, at the discretion of the judges, which is regulated by the circumstances of each particular case. 1 *Haw. c. 71 s. 3.*

II. By statute.

**Cheating by
false privy
tokens.**

By the 33 *H. 8. c. 1.* If any person shall falsely and deceitfully obtain, or get into his hands or possession any money, goods, chattels, jewels, or other things, of any other person, by colour and means of any false privy tokens, or counterfeit letter made in another man's name; and shall be convicted thereof, by examination of witnesses, or confession, at the assizes or sessions, or by action in any court of record; he shall have such punishment by imprisonment, pillory, or other corporal pains, (except death,) as the court shall appoint. Saving to the party grieved such remedy by action or otherwise, for the goods so obtained, as he might have had by the common law.

And two justices (1 *Q.*) may call and convent by process or otherwise (*A.*), to the assizes or sessions, any person suspected, and commit or bail him to the next assizes or sessions.

Get into his hands or possession] A person endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on suspicion of such fraud, before he hath got the goods into his possession, seems not to be within this statute. *E. 3 G. 2. K. and Brian. Sess. C. V. 2: 27.*

False privy token] On motion to quash an indictment, which was, that the defendant came pretending that such a person had sent him to receive 20*l.* and received it, whereas such person did not send him: By the court, It is not indictable, unless he came with false tokens; for we are not to indict one man for making a fool of another. *Blackerby, 79.*

H. 13 G. 2. K. and Munoz. It was adjudged, that an indictment averring the offence to be by false tokens; without shewing what those false tokens are, is not sufficient; and that the fraudulently procuring a note from a person, by

by falsely affirming that there was one in the next room, that would pay the money due upon it, whereas in fact there was no such person in the next room, is not a *false token*, but a false affirmation only. 1 *Sess. C.* 201. *Str.* 1127.

Note; the statute says a false *privy token*.

Corporal pain] L. *Coke* observes hereupon, that for this offence the offender cannot be fined, but corporal pain, only inflicted. 3 *Inst.* 133.

But Mr. *Hawkins* observes, that there is a precedent in *Cro. Car.* 564. by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand on the pillory, but also pay a fine of 500 l., and to be bound with good sureties to the good behaviour. 1 *Haw.* 188.

Commit or bail him] In this case the justices shall do well to take examination of the offence, and to certify the same, to the sessions or gaol delivery, and withal to bind over the informers and witnesses to give evidence therein. *Dalt.* c. 32.

By the 30 G. 2. c. 24. All persons who knowingly, ^{By false pre-} and designedly, ^{ences.} by *false pretence or pretences*, shall obtain from any person, money, goods, wares, or merchandizes, with intent to cheat or defraud any person of the same, shall be deemed offenders against law and the publick peace; and the court before whom any such offender shall be tried, shall on conviction order him to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or to be transported as soon as conveniently may be for seven years. s. 1.

False pretences] T. 28 G. 3. *K. v. Mason*. The defendant *Mason* was indicted for obtaining money by *false pretences* from one *Scofield*. *Mason* pleaded not guilty; and on his trial at the sessions at *Worcester*, he was convicted, and received sentence of transportation for seven years. The defendant brought a writ of error, and assigned for error, that it did not appear by the indictment, what the particular and specific false pretences were, by which *Mason* did obtain from *Scofield* the said money. This case was argued by *Marryatt* for the defendant, and by *Calderott, contra.*—*Buller J.* Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is that the indictment does not state what the false pretences were. The question is not a new one: I remember a case, when I was at the bar, though the name of it does not occur to me now,

now, and I argued it on the analogy to the case in *Strange* for obtaining a note by false tokens, which entirely governs this. That was a case on the statute 33 H. 8. c. 1. which makes it an offence to obtain money or goods by false tokens. The statute 30 G. 2. c. 24. only enlarges the description of the offence in the statute of H. 8. Both statutes are made *in pari materia*; and whatever has been determined in the construction of one of them, is a sound rule of construction for the other. The judgment was arrested in the case in *Strange*; because the indictment did not specify the *false tokens*: then, by the same reason, an indictment on 30 G. 2. c. 24. which speaks of *false pretences*, must state what the false pretences are, otherwise the indictment is bad: there is no distinction between the two cases, the same objection which held in the one must also prevail in the other. The other objections seem to have great weight in them, but it is not necessary to consider them in this case; because I am of opinion that the first objection is fatal.—*Grose J.* delivered his opinion to the same effect.—Judgment reversed, and the defendant ordered to be set at liberty. *Durnf. and East*, 2 V. 581.

H. 29 G. 3. *John Young, S. Randal, W. Mullins*; and *J. Osmer*, against the K. In error. An indictment was preferred at the sessions at *Bristol* against the defendants on 30 G. 2. c. 24. for obtaining money by false pretences. The first count in the indictment stated, that the defendants fraudulently intending, &c. on the 23d December, in the 28th year, &c. at, &c. unlawfully, knowingly, wilfully, and designedly, did falsely pretend to one *Thomas*, that *Young* had made a bet of 500 guineas on each side, with a colonel in the army then at *Bath*, that *William Lewis* would on the next day run on the high road leading from *Gloucester* to *Bristol* ten miles in one hour, and that *Young* and *Mullins* did go 200 guineas each of add in the said bet, and *Randal* the other 100 guineas: and did then and there, under colour and pretence of such bet, &c. obtain from *Thomas*, as a part of such pretended bet, 20 guineas of the 500 guineas, with intent to cheat and defraud him thereof: whereas, in fact, no such bet had been made, &c. to the evil example, &c.—The indictment contained several other counts to the same purport.—*Fielding* made several objections to this indictment.—*Griffith* contra, was stopped by the court.—*L. Kenyon Ch. J.* After asking whether there had been any solemn determination on an indictment on the statute; said, undoubtedly this indictment, being founded

on the statute of 30 G. 2. c. 24. is different from a common law indictment. When it passed, it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The 33 Hen. 8. c. 1. requires a false seal, or token, to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the 30 G. 2. c. 24. introduced another offence, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it. In the present case 4 men came to the prosecutor, representing a case as about to take place, that *W. Lewis* should go a certain distance within a limited time; that they had betted upon the event, and they should probably win: he was perhaps too credulous and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute. The second objection is, that the charge is imperfectly stated; but that is answered by the record. If the indictment did not inform the defendants what charge they were called upon to answer, the objection would be well founded. But it holds out to them sufficient intelligence of the offence imputed to them. It states the wager to be with "a colonel at *Bath*;" perhaps his name was not mentioned, so that he could not have been described in the indictment with greater accuracy. But if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence. As to the 3d objection: this case is extremely different from that of perjury to which it has been compared; because that depends on the very words which the person charged individually uses in a court of justice; and the words spoken by one cannot possibly be applied to another, as falsely

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uttering those very words. I do not see how that could ever have been doubted. But in this case all the defendants went together to the prosecutor, and thus carried a greater degree of credit; and they all joined in the relation as of a thing within their own knowledge. If they were all present, each acting a different part in the same transaction, no rule of criminal proceeding will be violated by adjudging them guilty of the imposition *jointly*. I admit that offences are not to be charged in such a manner as will confound the evidence; but in cases where it is necessary that several defendants shall be indicted jointly, and the evidence is complicated, it may be separated for each particular defendant, as was done in the case before Mr. J. Yates, at *Hersford*, in the trial of Mr. *Powell's* murderers. The 4th objection would be well founded, if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But in this case the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts: but if it were not so, I think they may be joined in the same indictment.—*Aspburst, Buller, and Grise, J's.* delivered their opinions at large to the same effect.— Judgment affirmed. *Durnf. and East*, 3 V. 98.

Power of the
justices.

And any justice, before whom any person charged on oath with having committed any of the offences aforesaid, shall examine by oath and such other lawful means as to him shall seem meet touching the matters complained of, and deal with the offender according to law: and if the party charged as being the offender shall be committed to prison, or admitted to bail, to answer the matters complained of at the next sessions or assizes; the said justice shall bind over the prosecutor to appear and prosecute such offender with effect; and if such goods so fraudulently obtained appear to such justice to exceed the value of 20l. the recognizance shall be in not less than double the value of the goods. 30 G. 2. c. 24. s. 2.

Bail.

And no person charged on oath with any offence against this act, and which requires bail, shall be admitted to bail, before 24 hours notice be proved on oath to have been given in writing to the prosecutor, of the names and abode of the bail, unless they be known to the justice, and he approve of them; and every such offender bound to the sessions, or general gaol delivery, shall be tried at the next sessions or general gaol delivery after his being apprehended,

unless the court think fit to put off the trial on just cause.
f. 17.

And no *certiorari* shall be granted to remove any pro- *Certiorari*,
 ceedings, in pursuance of this act. *f. 20.*

A. Warrant of two justices to apprehend an of-
 fender; on 33 H. 8. c. 1.

Westmorland. } To the constable of ———

WHEREAS complaint hath been made unto us whose
 names and seals are hereunto set, two of his majesty's
 justices of the peace for the said county, and one of us of the
 quorum, upon the oaths of A. I. of ——— yeoman, and
 B. I. of ——— yeoman, that on the ——— day of ———
 A. O. of ——— yeoman, did by a false privy token [or
 counterfeit letter] that is to say, by [here particularize the
 offence] falsely and deceitfully obtain and get into his hands
 and possession [here mention the things] from C. I. of ———
 contrary to the statute in that case made: These are therefore to
 command you, upon sight hereof, forthwith to bring the said
 A. O. before us at ——— on the ——— day of ——— to
 answer to the said complaint, and further to be dealt withal ac-
 cording to law. Given under our hands and seals the ———
 day of ———.

Cheese. See Butter.

Chimney Sweepers.

BY 28 G. 3. c. 48. After the 5th July 1788, the Binding appren-
 churchwardens and overseers of the poor of any pa- tices.
 rish or place, with the consent of two justices under their
 hands (B), may bind or put out any boy of the age of eight
 years or upwards, who is chargeable, or whose parents
 are chargeable to the parish or place where they shall be;
 or who shall beg for alms; or by and with the consent of
 the parent of such boy, by indenture according to the
 form (A) to be an apprentice to any person using the trade
 of a chimney sweeper, until such boy shall attain the age
 of sixteen years. And the age of such apprentice shall be Age.
 inserted in the indenture, taken from a copy of the re-
 gister

Chimney Sweepers.

gister (where the same can be had) attested by the minister without fee, and written on paper without stamp; and where such copy cannot be had, such justices, as fully as they can, shall inform themselves of the age of such apprentice, and the age so inserted, in relation to the continuance of his service, shall be taken to be his true age without further proof. *f. 1, 2, 3.*

Stamp.

And such indenture shall be liable to no more stamp duty than is charged for binding out other poor children.

f. 3.

Penalty on taking apprentices under eight years of age and the binding so be void.

And all indentures, covenants, promises, and bargains, to be made or taken for employing such apprentice or servant under the age of eight years, shall be absolutely void in law to all intents and purposes; and every person who shall take, employ, retain, or keep any such boy to be employed in the capacity of a climbing boy or chimney sweeper, under the age aforesaid, or contrary to the tenor and true meaning of this act, shall on conviction, forfeit any sum not exceeding 10*l.* nor less than 5*l.* for every such apprentice or servant. *f. 4.*

Townships and villages.

And the overseers of the poor of any *township* or *village* may execute all things by this act directed to be done by churchwardens and overseers of a *parish*. *f. 5.*

Justices to determine differences.

And one justice may hear and determine all complaints and differences between masters and apprentices in this business, and make orders therein in the same manner as in other cases between masters and apprentices. *f. 6.*

Not to have more than six apprentices at the same time.

But no such master shall retain, keep, or employ any more than six apprentices at the same time; and shall cause his name and place of abode to be put upon a brass plate, to be affixed in the front of a leathern cap, which such master shall provide for each such apprentice, and which he shall wear when out upon his duty, on pain of forfeiting for every such apprentice above such number, or without having such cap, not exceeding 10*l.* nor less than 5*l.* *f. 7.*

Breach of the indenture.

And if any such master shall misuse or evil treat his apprentice, or any such apprentice shall have just cause to complain of the breach of any of the covenants contained in such indenture, such master, being convicted thereof, shall forfeit not exceeding 10*l.* nor less than 5*l.* *f. 8.*

Boys not to be let out to hire, nor to call the streets but at certain times.

And no such master shall let out to hire, or lend by the day or otherwise to any other person for the purpose of sweeping chimnies, any such apprentice; nor shall cause him to call the streets before seven in the morning, nor after twelve at noon, between *Michaelmas* and *Lady-day*; nor

nor before five in the morning, nor after twelve at noon, between *Lady-day* and *Michaelmas*, on the like penalty.

f. 9.

All penalties and forfeitures by this act imposed, and all costs and charges to be allowed and ordered, may be recovered on conviction of the offender, before one justice, by confession, or oath of one witness, and levied by distress, and shall be paid, one half to the informer, and the other half to the overseer of the parish or place where the master shall inhabit; and in case sufficient distress cannot be found, and such penalties and costs shall not be forthwith paid, such justice shall commit such offender to the gaol or house of correction where the offence is committed or order made, for any time not exceeding three months, unless such penalty and costs be sooner paid. *f. 10, 11.*

Penalties, how to be levied and applied.

But no warrant of distress shall be issued for levying any penalty or costs, until six days after the offender is convicted, and an order made and served upon him for payment thereof. *f. 12.*

Warrant of distress not to be issued until six days after the conviction.

No distress shall be deemed unlawful nor the party making the same a trespasser for want of form in the proceedings, nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which may afterwards be done by the party distraining. *f. 13.*

Distress not unlawful for want of form.

Any person who shall think himself aggrieved may appeal to the next sessions, having first entered into a recognizance, with sufficient surety before such justice, to prosecute and abide by the order that shall be made on such appeal; and also giving to the justice by whose act such person shall think himself aggrieved, notice in writing of his intention to appeal, and the matter thereof, within six days after the cause of complaint shall have arisen, *f. 16.*

Appeal.

A. Form of the indenture.

THIS INDENTURE, made the — day of — in the — year of the reign of — and in the year of our Lord — BETWEEN A. B. and A. C. churchwardens and overseers of the poor of the parish of — [or E. F. father or next friend of the boy] of the one part; and A. M. of the parish of — in the county of — chimney sweeper, of the other part: WITNESSETH, that the said churchwardens and overseers of the poor [or the said E. F.] by and with the consent and approbation of G. I. and H. I.

Chimney Sweepers.

two of his majesty's justices of the peace acting in and for the _____ of _____ signified as hereunder written; have put, bound, and by these presents do put and bind A. P. a poor boy of the said parish, being the age of _____ years, to be apprentice to the said A. M. he being his first, second, [or as the case may be] apprentice, to learn the trade, business, art, and mystery of a chimney sweeper, and with him to dwell, remain and serve from the day of the date of these presents, for and during the term of _____ years from thence next ensuing, fully to be compleat and ended, during all which time be the said A. P. his said master faithfully shall serve and obey, his secrets keep, and his lawful commands every where gladly do and perform; he shall not haunt alehouses, or gaming houses, nor absent himself from the service of his said master, day or night, without his leave, but in all things as a faithful apprentice shall behave himself towards his said master and all his during the said term: And the said A. M. in consideration of the good will which he hath and beareth towards the said apprentice, and of the faithful service so to be performed by him, doth hereby covenant, promise, and agree with the said churchwardens and overseers of the poor [or the said E. P.] that he the said A. M. his said apprentice, in the art and mystery of a chimney sweeper, which he now useth, shall and will teach and instruct, or cause to be taught and instructed, in the best manner that he can, and shall and will provide and allow unto the said apprentice during all the said term, competent and sufficient meat, drink, washing, lodging, apparel, and all other things necessary for the said apprentice: And that the said A. M. executors, administrators, or assigns, shall not nor will assign over his present indenture, or the apprentice to be bound thereby, without the consent and approbation in writing, of two or more such justices of the peace, to be signified according to the form of the approbation hereunder written. AND WHEREAS, from the nature of the business or employment of a chimney sweeper, it is necessary for the boys employed in climbing, to have a dress particularly suited to that purpose, which dress is only fit for that part of the occupation; the said A. M. doth hereby also covenant, promise, and agree, as and with the said churchwardens and overseers of the poor [or the said E. P.] to find and allow such suitable dress for the said apprentice, as often as need or occasion shall be and require, and provide for and deliver to the said apprentice, once in every year at least, during the term aforesaid, over and above the said dress proper for climbing; one whole and compleat suit of clouthng, with suitable linen, stockings, hats, and shoes. AND FURTHER, that

Chimney sweepers.

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that the said A. M. shall and will at least once in every week cause the said apprentice to be thoroughly washed and cleansed from soot and dirt, and shall and will require the said apprentice to attend the publick worship of God on the sabbath day, and permit and allow him to receive the benefit of any other religious instruction; and that the said apprentice shall not wear his sweeping dress on that day: And that the said A. M. shall not, nor will compel or oblige the said apprentice to call the streets, or any other places, before seven of the clock in the morning, nor after twelve of the clock at noon, between Michaelmas and Lady-day, nor before five of the clock in the morning, nor after twelve of the clock at noon, between Lady day and Michaelmas; and that the said A. M. shall not nor will at any time during the said term, let out his said apprentice for hire by the day, night, or otherwise, to any other person or persons exercising or using the said trade, nor shall he the said A. M. or any person or persons whomsoever by his directions, require or force him the said apprentice to climb or go up any chimney which shall be actually on fire, nor make use of any violent or improper means to force him to climb or go up any such chimney; but shall in all things treat his said apprentice with as much humanity and care as the nature of the employment of a chimney sweeper will admit of. IN WITNESS, &c.

B. Form of approbation by justices.

WE the above-named G. I. and H. I. two of his majesty's justices of the peace acting in and for the county of —, having inspected and examined the above-named A. P. do hereby consent to and approve of his being bound [or assigned over] as an apprentice to the above-named A. M. according to the term and stipulations expressed in the above written indenture.

Chocolate. See *Critique*.

Church and church-yard.

THE ancient Saxon word is *cyrcce*, the Danish *kircke*, the Belgick *kercke*, the Cimbrick *kirka* or *kurk*; probably from the Greek word *κυριακος*, belonging to the Lord, or *κυριος οίκος*, the Lord's house: so that we have lost

Original of the word church.

Church and church-yard.

the ancient pronunciation of the word (except in the northern parts of *England* and *Scotland*) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient *Greeks* and *Romans* always pronounced hard, as the letter *k*.

Uniting of churches.

In cities and towns corporate, the bishop (with the consent of the mayor, aldermen, and justices of the peace, and of the patron) may unite two churches or chapels; and make order with the like consent, that the patrons present by turns, having regard to the value of the livings united: and the incumbents thereof shall be graduates. 17 Car. 2. c. 3.

New churches.

Clauses are commonly inserted in the several acts of parliament for making provision for the rectors of new churches, which clauses give certain powers to justices of the peace, in relation to the assessments to be made for that purpose. And in the case of borrowing money for rebuilding clergymen's houses, by the 17 Geo. 3. c. 53. the estimates are to be sworn to before a justice of the peace or master in chancery.

Markets in the church-yard.

No fairs nor markets shall be kept in church-yards. 13 Ed. 1. ft. 2. c. 6.

Arrest in the church or church-yard.

Clergymen shall not be arrested, and drawn out of any church or church-yard, whilst they attend to divine service; on pain of imprisonment of the offender, and ransom at the king's will, and satisfaction of the party arrested. 50 Ed. 3. c. 5. 1 R. 2. c. 15.

Also it is said, that arrests in civil cases ought not to be of persons going to or coming from church; but that a warrant from a justice of the peace for the king may be executed in such cases. *Cro. Car.* 602. *Cro. Jac.* 321. 2 *Bull.* 72.

But although the officer may be punished for the same either in the spiritual or temporal courts, yet the arrest (if not on a Sunday) is good in law. *Watson, c.* 34. p. 344.

Brawling in the church or church-yard.

If any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard, the ordinary (on proof of two witnesses) may suspend every layman, being an offender, ab ingressu ecclesiæ; and every clergyman from the ministration of his office, so long as he shall think meet. 5 & 6 Ed. 6. c. 4. f. 1.

Striking in the church or church-yard.

If any shall smite, or lay any violent hands on another in any church or church-yard, he shall be deemed ipso facto excommunicate, and be excluded from the fellowship and company of Christ's congregation. 5 & 6 Ed. 6. c. 4. f. 2.

Lay any violent hands] But churchwardens, or perhaps private persons, who whip boys for playing in the church,
or

or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of this statute. 1 Haw. 139.

Shall be deemed ipso facto excommunicate] And he shall not excuse himself by shewing that the other assaulted him. 1 Haw. 139.

Ipso facto] Nevertheless, in this and other like cases, there ought either to be a precedent conviction at law, which must be transmitted to the bishop; or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial. 1 Haw. 139.

If any shall maliciously strike another with any weapon, in any church or church-yard, or shall there draw any weapon with intent to strike, and shall be convicted thereof by verdict of 12 men, or confession, or by two witnesses, before the judges of assize, or justices of the peace in their sessions, he shall be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with a hot iron having the letter F, whereby he may be known and taken for a fray maker and fighter; and he shall also stand ipso facto excommunicate. 5 & 6 Ed. 6. c. 4. s. 3.

Striking with a weapon in the church or church-yard.

He who steals goods belonging to a parish church, may be indicted for stealing the goods of the parishioners. 1 Haw. 94.

Sacrilege.

For other matters, see title Churchwardens.

Churchwardens.

- I. Who are exempted from being churchwardens.
- II. Choosing and swearing of churchwardens, with their duty thereupon.
- III. Their duty in levying rates; and therein of vestries, and select vestries.

IV. Their

Churchwardens.

IV. Their duty as to repairs; and therein concerning church seats.

V. Their duty as to sundry other matters.

VI. Concerning presentments; and therein of fidejimen or assistants.

VII. Their accounting.

VIII. Their punishment on misbehaviour.

IX. Their indemnity on doing their duty.

I. Who are exempted from being churchwardens.

Peers, clergymen, and members of parliament.

ALL peers of the realm, by reason of their dignity: so are all clergymen, by reason of their order: and also all parliament men by reason of their privilege, are exempted from the office of churchwarden. *Gibf. Cod. 215.*

Attornies.

A counsellor or attorney ought not to be chosen churchwarden: and if he is, he may have a prohibition, by reason of his attendance on the courts at *Westminster*. 2 Roll's Abr. 272.

Apothecaries and surgeons.

Apothecaries, who have served 7 years, shall be exempted from the office of churchwarden. 6 *W. c. 4.*

And by the 18 *G. 2. c. 15.* Freemen of the corporation of surgeons in *London* are exempted from being churchwardens.

Dissenting ministers.

Dissenting teachers or preachers, in holy orders, or pretended holy orders, being duly qualified, are exempted from the office of churchwarden. 1 *W. sess. 1. c. 18.*

And by 31 *G. 3. c. 32.* every Roman catholic minister, on taking the oath, and conforming to the regulations therein specified, shall be exempted from the office of churchwarden. *f. 8.*

Other dissenters.

Other dissenters, scrupling to take upon them the office, may execute the same by a sufficient deputy, to be approved of in like manner as other churchwardens. 1 *W. sess. 1. c. 18.*

Persons having convicted a felon.

All persons who have prosecuted a felon to conviction, and the first assignee of the certificate thereof, are exempted from the office of churchwarden in the parish where the offence was committed. 10 & 11 *W. c. 23. f. 2.*

Persons serving in the militia.

No serjeant, corporal, or drummer of the militia, nor any private man, from the time of his inrollment until his discharge, shall be liable to serve as churchwarden. 26 *G. 3. c. 107. f. 130.*

II. Cbu-

II. Choosing and swearing churchwardens, with their duty thereupon.

Churchwardens shall be chosen yearly in *Easter week*, by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, the minister shall choose one, and the parishioners another. *Canons of 1603. 89.* When to be chosen and by whom.

But where there is a custom for the parishioners to choose both, that custom shall continue. *Gibf. Cindex, 242.*

A person chosen churchwarden, refusing to take his office and oath, may be excommunicated for the refusal: and no prohibition will lie. *Id. 243.* Refusing to take the office.

And the ecclesiastical judge refusing to swear him, may be compelled by a mandamus. *Id. 243.* Refusing to swear them.

The churchwarden's oath, as said to have been agreed on, upon mutual consultation between the civilians and common lawyers, is as follows: Churchwarden's oath.

You shall swear truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm: so help you God and the contents of this book. *Id. 243.*

Churchwardens being thus sworn, are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them; and also to purchase goods for the use of the parish; but they are not a corporation in such sort, as to purchase lands, or take by grant, except in *London* by custom. *Id. 241.* Churchwardens a body corporate.

Churchwardens shall continue in office, till the new churchwardens be sworn. *Can. 118.* How long they shall continue.

III. Their duty in levying rates; and therein of vestries and select vestries.

The rates must be made with the consent of the major part of the parishioners, housekeepers, or occupiers of land. In order to which, publick notice of a vestry (a place so called from the vestments of the minister kept there) ought to be given the *Sunday* before, either in the church after divine service is ended, or else at the church door as the parishioners come out; both of the calling of the said meeting, and also of the time and place of the assembling of it. And it will be fairest then also to declare for what business the said meeting is to be held, that
no

Summoning a vestry.

Churchwardens.

no one may be surprized, but that all may have full time before, to consider what is to be proposed at the said meeting. And it is usual that for half an hour before it begins, one of the church bells be tolled to give the parishioners notice when they are met. 5 Co. 67. *Shaw. Par. Law. 54.*

Who shall have a vote in the vestry.

At the common law, every parishioner who paid to the church rates, and no other, had a right to vote. *Shaw. 56.* And those that pay no church rate shall have no vote in affairs relating to it, except it be the rector or vicar. *Wood, b. 1. c. 7.*

Who may adjourn the vestry.

All persons who have a vote in the vestry have an equal right, and neither the minister nor churchwardens, without a special custom, can adjourn the vestry; but this can only be done by a majority of the whole assembly. *Str. 1047.*

Laying the rates.

When the churchwardens and parishioners are there met, they are to consider what sum of money it will be necessary to raise for such repairs as shall then be needful; and after they have agreed what sum is fit, they are to make an equal levy. *Digge, 171.*

Majority to bind the parish.

And the major part of them that appear, shall bind the parish; or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished, in defect of repairs. *Gibb. 220.*

Entering in a book.

It is most convenient, that every parish act there be entered in the parish book of accounts, and every man's hand consenting to it be set thereto; for then it will be a certain rule for the churchwardens to go by. *Shaw. 55.*

Select vestry.

By custom there may be select vestries of a certain number of persons elected yearly to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. *Read. Ch. Service. Gibb. 246. Str. 428.*

Two rates; one for the fabric, another for ornaments.

It is holden, that a rate for the reparation of the fabric of a church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. *Gibb. 220.*

And in *Jessery's case*, 5 Co. 67. it was solemnly adjudged, that the rates for the repair of the church shall be laid upon every occupier of lands in the parish, altho' such occupier live in another parish; and such person may come to the vestries of the parishioners, and vote in the making a rate: but he shall not be charged towards the ornaments

ments of the church, as for bells, repair of seats, bread and wine, clerk's wages, visitation charges, and the like, by reason of such lands; for that the personal estates of the inhabitants are chargeable with every thing that doth not relate to the fabrick of the church, or repairs of the fences of the church-yard, or such other things as concern the freehold.

And therefore some have been of opinion, that churchwardens should make two rates; one upon lands and houses, which may concern the freehold of the church, and another upon personal estates and stock, to defray other expences. But as this method creates confusion, so it is seldom practised.

And Sir *Simon Degge* says, that he conceives the law to be clear otherwise; and that a foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, which he never observed to be practised within his knowledge. But he leaves it a query, among a diversity of opinions. p. 173.

And Mr. *Shaw*, in his Parish law, having cited the authors who hold these different opinions, says, that the practice generally now goes according to the opinion last mentioned, namely, that foreigners occupying lands within the parish shall be charged to both; and that the ecclesiastical judges, as well as the temporal, for the ease and convenience which accrues from the making of one levy for all, do give countenance thereto, and begin to treat the contrary opinion as obsolete and out of doors. p. 92.

A taxation by the pound rate is the most equitable way, and not according to the quantity of the land. Equal pound rates.
Wood, b. 1. c. 7.

E. 32 G. 3. Stead and another v. Heaton and another. Custom in a parish to pay the church rate by divisions, what shall be deemed evidence thereof.
In an action for a false return to a *mandamus*, that there was no custom within the parish of *Bradford* that the inhabitants of the chapelry of *Haworth* ought to contribute one-fifth part of the money raised for the reparation and support of the parish church of *Bradford*; nor any custom for the chapel-wardens of *Haworth* to make any rate upon the inhabitants of the township for church rates; several questions arose; amongst others, 1st, The custom alledged in the declaration was, that the *chapel wardens* of *Haworth* should pay to the *churchwardens* of *Bradford* so much. And by the evidence it appeared, that the parish
10 of

Churchwardens.

of *Bradford* consisted of six townships or vills, of which the town of *Bradford* and the chapelry of *Haworth* were two; and that each of these districts nominated their own two wardens at a vestry held for the whole parish. But the wardens of the town of *Bradford* were proved to have been always called *churchwardens*, and did in fact superintend the parish church: and the wardens of the other townships were always called *chapelwardens*. It was objected that this custom was bad; for it appeared that the churchwardens alluded to were only officers for a particular township, and by law there could be no churchwardens of any other division than a parish; and taking them to mean the churchwardens of the whole parish, as upon the face of the custom they must be supposed to mean, then the evidence did not support the allegation. 2dly, The custom in question being in dispute between the town of *Bradford* on the one hand, and the chapelry of *Haworth* on the other, evidence was admitted on the part of *Bradford* of certain accounts of their own wardens in 1679, in which were the following entries; "Received of *Haworth*, who this year disputed this our ancient custom, but after we had sued them, paid it accordingly, 8l. & 1l. for costs." And at the head of the same page was written; "It is an ancient custom thus to proportion church lay, 1st, The chapelry of *Haworth* pay one fifth; *Bradford* a third of the remainder, and the rest to be equally divided according to the churchwardens of the several other townships in the parish." It was objected that these accounts coming out of the hands of *Bradford* officers could not be made evidence by them of a right to call upon *Haworth* to contribute towards their rates. And that at all events if the receipt were evidence of the actual payment, the other part stating the custom ought not to be so considered.—Both these objections were overruled by *Buller J.* at the last *York* assize, and a verdict was taken for the plaintiffs, subject to be set aside, and a nonsuit entered, if this court should be of a different opinion. To the first he answered, that it was enough to support the custom that the officers of *Bradford* had always in point of fact been called *churchwardens*, and therefore it was a mere matter of description. As to the 2d objection he said, that the receipt was good evidence, because the officers of *Bradford* thereby charged themselves with the actual receipt of so much money to the use of the publick, for which they were bound to account. And that

that as to the other writing stating the custom, it was evidence on account of its being referred to by the receipt, and appearing to be all one document.—A rule *nisi* for setting aside the verdict having been granted;—*Law* shewed cause against it; and *Chambre* and *Topping* again urged the same objections as before.—*L. Kenyon* Ch. J. As to the first objection: these officers may have obtained the name of churchwardens of the town of *Bradford* by prescription, for church-rates depend upon prescription alone. But if that be not their legal name, it is sufficient here, for they have made their return to the writ of *mandamus* as churchwardens of the town of *Bradford*; and it is merely a name of description. And with regard to the admissibility of the evidence; it is clear that one entry was properly admitted, because it charged the parish officers with the receipt of the money: and then the entry immediately preceding it must also be admitted, because the other refers to it; in fact they are both parts of one and the same transaction, each explaining the other. Even without this reference, I do not see any objection to admitting the 2d entry as evidence *proprio vigore*, because usages relating to parishes must be got out of the parish books. It is like the instance of court rolls, which are frequently admitted in evidence, tho' they affect the rights of third persons. However it is not necessary to decide it on this ground, tho' I have a strong opinion upon it, but without resorting to it, I am clearly of opinion that it is admissible for the reason first given.—The other judges concurred. Rule discharged. *Durnf. and East*, 4 V. 669.

Where lands are in farm, not the lessor, but the tenant shall be rated and pay. *Gibf.* 221.

Tenant to be charged, and not the landlord. Impropiator how far chargeable.

An impropiator, tho' bound to repair the chancel, is also bound to contribute to the reparations of the church, if he hath lands in the parish, which are not parcel of the parsonage. *Id.* 221, 223.

If any person find himself aggrieved at the inequality of the assessment, his appeal must be to the ecclesiastical judge. *Dgge.* 172.

Appeal against the rates.

And in such case, if he will be relieved, he must shew, that he is illegally or unequally taxed in respect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over-rated, or that the rate was needless, or that some lands in the parish are omitted in the rate. *Wood*, b. 1. c. 7.

If

Rates how to be recovered.

If any refuse to pay the rates, being demanded by the churchwardens, they are to be sued for in the ecclesiastical courts and not elsewhere. *Gibf. 219. Degge, 171.*

Quakers refusing to pay.

Also a quaker, refusing to pay church rates, may be sued, as other parishioners, in the ecclesiastical court; or he may be prosecuted before the justices of the peace, in the same manner as for his tithes.

IV. Their duty as to repairs; and therein concerning church seats.

Who shall repair.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the parishioners; and the disposing of the seats therein, the right of the ordinary. *Gibf. 221.*

Who may compel the repairs to be made.

The spiritual court may compel the parishioners to repair the body of the church, and may excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved, till the greater part agree to a tax. *Read. Ch. Service.*

Difference between adding something new, and repairing the old.

If the churchwardens erect or add any thing new, either to the fabrick of the church, utensils, or church-yard, they must have the consent of the parishioners; and if such additions are in the church, the bishop's license is also necessary. But where necessary repairs are wanting, the greater part of the parish will bind the less; and if the major part will not consent, where repairs are necessary, the churchwardens may repair without their consent, if upon notice given they refuse to meet, or when they are met, refuse to make a rate. But if a church fall down, the parishioners are not bound to rebuild it. *Read. Ch. Service. 1 Vent. 367.*

Majority may rebuild.

But if a church be so much out of repair, that it is necessary to pull it down, or so little, that it needs to be enlarged, the major part of the parishioners may make a rate for new building or enlarging, as there shall be occasion. This was declared in the 29 C. 2. by all the three courts successively; notwithstanding the cause was laboured by a great number of quakers, who opposed the rate. *Gibf. 221.*

Repairing the chancel.

The parson, that is, the spiritual rector, as also the lay impropiator, are bound by common right to repair the chancel, and is thereupon intitled to the chief seat therein, unless another hath it by prescription; yet he hath not

not the disposal of the seats therein, but the bishop.
Id. 223, 224.

An aisle in a church, which hath time out of mind be-
longed to a particular house, and been maintained and
repaired by the owner of that house, is part of his frank
tenement, and the ordinary cannot dispose of it, or inter-
meddle in it. *Id.* 221. Repairing an
isle.

A seat, or priority in a seat, in the body of the church,
may be prescribed for as belonging to a house, if it hath
been used, and also repaired, time out of mind, by the in-
habitants of such house. *Id.* 221. Seat inseparable
from the house.

And no one can claim a seat in a church by prescription
as appendant or belonging to land; but it must be laid as
belonging to a house, in respect to the inhabitancy there-
of. *Wood, b. 1. c. 7.*

And therefore a seat may not be granted to a person and
his heirs absolutely; for the seat doth not belong to the
person but to the inhabitant. *Gibf.* 221.

V. Their duty as to sundry other matters.

Every churchwarden is an overseer of the poor, altho' Overseer.
every overseer of the poor is not a churchwarden. 43 *El.*
c. 2. s. 1.

And in *M. 15 C. 2.* A churchwarden was committed
by the two next justices, as churchwarden, for refusing to
account for the money received and disbursed by him; but
on an *habeas corpus* he was discharged: because by the war-
rant of commitment it ought to appear that he was over-
seer of the poor, for by the statute of 43 *El.* that is an-
nexed to his office of churchwarden, and the justices have
no jurisdiction over him as churchwarden, but as overseer.
Dak. 186.

They are to see that the church ways be well kept Church way.
and repaired. And the right to a church way may be
claimed and maintained by a libel in the spiritual court.
2 *Roll's Abr.* 287.

Churchwardens have the care of a benefice during its Vacancy.
vacancy: Having first taken out a sequestration from the
spiritual court, they are to manage all the profits and ex-
pences of the benefice for him that shall next succeed;
plough and sow his glebe; take in the crop; collect tithes;
thrash out and sell corn; repair houses and fences, and the
like. And they shall take care that during the vacancy the
church shall be duly served by a curate approved by the
bishop, whom they are to pay out of the profits of the be-
nefic. nefic.

nessee. And if the successor thinks himself aggrieved by them, he may appeal to the ecclesiastical judge. *Par. L. 99. Com. Par. Off. 90.*

Worldly calling
on the Lord's
day.

They (or the constable) shall levy the penalties for persons exercising their worldly calling on the Lord's day. *29 C. 2. c. 7.*

Profanation of
the church.

They shall suffer no plays, feasts, banquets, suppers, church ales, drinkings, temporal courts or leets, lay juries, musters, or any profane usage to be kept in the church or church yard. *Can. 88.*

Attending di-
vine service.

They shall see that the parishioners resort to church, and continue there orderly, during divine service; and shall present the defaulters. *Can. 90.*

Loitering in the
church yard.

They shall not suffer any idle persons to abide either in the church yard, or church porch, during the time of divine service, or preaching; but shall cause them to come in, or to depart. *Can. 19.*

Levying 12 d. a
Sunday for not
coming to
church.
Sport's on the
Lord's day.

They shall levy the forfeiture of 12 d. a Sunday, on the goods of persons not coming to church. *1 El. c. 2.*

They (or the constable) shall levy the penalty of 3 s. 4 d. for using unlawful pastimes on the Lord's day. *1 C. c. 1.*

Conventicles

They (or the constables or overseers) shall levy the penalties for being present at unlawful conventicles. *22 C. 2. c. 1.*

Recusants.

They shall, on pain of 20 l. present at the sessions once a year, the monthly absence from church of all recusants, and the names and ages of their children above nine years old, and the names of their servants. And if the party presented shall be indicted and convicted, the churchwardens shall have a reward of 40 s. to be levied of the recusant's goods, by warrant of the justices in sessions. *3 J. c. 4.*

Excommunicate
persons.

They shall keep excommunicated persons out of the church. *Can. 85.*

Ornaments of
the church.

They shall take care to have in the church a large bible, book of common prayer, book of homilies, a font of stone, a decent communion table, with proper coverings, the ten commandments set up at the east end, and other chosen sentences upon the walls, a reading desk, and pulpit, and chest for alms; all at the charge of the parish. *Can. 80, 81, 82, 83, 84.*

Bells.

They ought to keep the keys of the belfry, and to take care that the bells be not rung without good cause, to be allowed by the minister and themselves. *Can. 88.*

They

They shall have a box, wherein to keep the register, Register. with three locks and keys, two keys to be kept by them, and one by the minister; and every Sunday they shall see that the minister enter therein all christenings, weddings, and burials that have been the week before: and at the bottom of every page, they shall (with the minister) subscribe their names. And they shall, within a month after March 25, yearly, transmit to the bishop a copy thereof for the year before subscribed as above.

And such register, being carefully preserved, is good evidence; and the falsifying of it is punishable at the common law. *Gibf. 229.*

They shall at the charge of the parish, with the advice and direction of the minister, provide bread and wine against the communion. *Can. 26.* Communion;

They (or the overseers) shall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. 13 & 14 C. 2. c. 4. Incumbent.

They shall collect money on charity briefs, on pain of 20*l.* 4 An. c. 14. Charity briefs;

They shall not suffer any strangers to preach, but such as shall appear qualified on shewing their licence; and they shall see that such preachers register or subscribe their names in a book to be kept for that purpose, with the day when they preached, and the bishop's name who granted the licence. *Can. 50, 52.* Strange preachers.

They shall, on certificate from the minister, apply to the magistrates for conviction of offenders in not burying in woollen. 30 C. 2. c. 3. Burying in woollen.

Persons who murder themselves, or die excommunicated, are denied christian burial; and therefore the churchwardens are not to suffer them to be buried in the church or church yard, without special licence from the bishop. *Digge, 183.* Persons denied christian burial.

They shall levy the penalties for eating flesh on fish days. 5 El. c. 5. Eating flesh on fish days.

They shall receive the penalties for servants, labourers, apprentices, or journeymen gaming in publick houses. 30 G. 2. c. 24. Gaming.

They shall receive the penalties for tipling and drunkenness. 4 G. c. 5. 21 G. 2. c. 7. Drunkenness.

They (or the constable) shall levy the penalty for suffering tipling. 1 J. c. 9. Suffering tipling.

They shall receive the penalties for hawking spirituous liquors. 9 G. 2. c. 23. Spirituous liquors.

They (or the overseers) shall levy the penalty for selling corn by a wrong measure, 22 G. 2. c. 8. Corn.

Churchwardens.

Butter and
cheese.

They (or the overseers) shall receive the penalties relating to butter and cheese. 13 & 14 C. 2. c. 26.

Weights and
measures.

They (or the overseers) shall levy the penalties relating to weights and measures. 16 C. c. 19. 22 G. 2. c. 8.

Hawkers and
pedlars.

They shall carry hawkers and pedlars trading without licence, before a justice of the peace. 9 & 10 W. c. 27.

Greenwich
hospital.

They, together with the minister, are to sign certificates for the out-pensioners of Greenwich hospital, residing within their parish, with respect to the identity of their persons, in order to the receiving of their pensions. 3 G. 3. c. 16.

County rate.

They (or the overseers) shall pay to the high constables the general county rate, out of their money collected for the poor. 12 G. 2. c. 29.

Servants firing
houses.

They shall receive the penalty for servants carelessly firing houses. 6 An. c. 31.

Tracing hares.

They shall receive the penalties for tracing hares in the snow (and other game penalties). 1 J. c. 27.

Surveyors of the
highways.

They shall join with the constable and surveyor of the highways in chusing and returning new surveyors. 13 G. 3. c. 78.

VI. Of presentments; and therein concerning sidesmen or assistants.

Oath to present.

Churchwardens by their oath are to present or certify to the bishop, or his officer, all things presentable by the ecclesiastical laws, which relate to the church, minister, and parishioners.

Book of articles.

The articles delivered to them for their direction, are for the most part founded on the book of canons made in the year 1603, and the rubricks of the common prayer.

Statute present-
ments.

There are also several things which they are bound to present by act of parliament: as tipling or drunkenness, by the statute of 4 J. c. 5. recusants by 3 J. c. 4.

When to pre-
sent.

They may present as often as they please, but shall not be obliged above once a year where it hath so been used, and not above twice any where; except it be at the bishop's visitation. Can. 116, 117.

Free for taking
in presentments.

For the presentments of any church or chapel for one year, the register shall have only 4d. Can. 116.

Minister may
present.

The minister may present where the churchwardens neglect. Can. 113. But such presentment ought to be upon oath. 2 Vent. 42.

In larger parishes, there are officers called sidesmen (an- Sidesmen.
tiently synodsmen, otherwise called questmen) to assist the
churchwardens in their inquiries and presentment of of-
fenders: They shall be chosen yearly in *Easter* week by
the minister and parishioners, if they can agree; if not, by
the bishop. *Can.* 90.

The sidesman's oath, said to have been agreed on by Sidesman's oath.
the civilians and common lawyers, is this:

*You shall swear, that you will be assistant to the church-
wardens in the execution of their office, so far as by law you are
bound: So help you God.* *Gibf.* 242.

VII. Their accounting.

At the end of the year, or within a month after at When to ac-
most, they shall before the minister and parishioners (at a count.
vestry) give up a just account of such money as they have
received, and also what they have particularly bestowed in
reparations, and otherwise, for the use of the church; and
shall deliver up to the parishioners the money and parish
goods in their hands, to be delivered over by them to the
next churchwardens by bill indented. *Can.* 89.

And if they refuse, they may be presented at the next How compelled
visitation by the new churchwardens; or any of the parish to account.
that are interested may by process call them to account be-
fore the ordinary; or the succeeding churchwardens may
have a writ of account at common law. And if they
have disbursed more than they have received, the suc-
ceeding churchwardens shall pay what is due to them,
and account it among their disbursements. *1 Roll's
Abr.* 121.

In the case of *Leman v. Gaulty* and another, *H.* 29 *G.* 3. Power of the
it was determined, That although the spiritual court may spiritual court.
compel the churchwardens to deliver in their accounts, they
cannot decide on the propriety of the charges made
therein: And when they had delivered in their accounts,
they had done every thing which that court had a power
of enforcing, and there was an end of their jurisdiction, it
was *functus officio*, and if they take any step afterwards, it
is an excess of jurisdiction for which a prohibition will be
granted even after sentence. *Durnf. and East.* 3 *V.* 3.

If the custom of the parish is, for a certain number of Accounting to a
persons to have the government thereof, and the account select vestry.
is given up to them; the custom is a good custom, and the
account given to them a good account. *Gibf.* 242.

Vouchers.

Mr. Barlow says, that for disbursements of any sum not above 40s. their own oath is held sufficient proof; but for all sums above, receipts must be produced. *Barl.* 105. But it may be more satisfactory if receipts be produced for all.

Allowance of the account.

The allowance of the account may be by entring it in the church book of accounts, and having it signed by those in the vestry who allow the accounts. *Barl.* 105.

Account allowed, final.

When they have faithfully accounted, and their account is allowed by the minister and major part of the parishioners present, it shall not afterwards be in the power of any to make them account again; unless some fraud in their accounts is afterwards discovered. *Wood, b. 1. c. 7.*

E. 7 G. 2. Wainwright and Bagshaw. The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the vestry according to law. Which plea was rejected; and thereupon a prohibition was granted: for the ordinary is not to take the account, he can only give a judgment that they do account; and to what purpose should they be sent back, to those who have taken their accounts already. *Str.* 974, 1133.

VIII. Their punishment on misbehaviour.

Churchwardens committing waste.

If the churchwardens waste the goods of the church, the new churchwardens may call them to an account before the bishop, or bring their action at common law. *Read. Ch. Service.*

Parishioners may be evidence against them.

And whereas many churchwardens and overseers, and other persons intrusted to receive collections for the poor, and other publick monies relating to the churches and parishes whereunto they belong, do often mispend the same, to the prejudice of such parishes, and of the poor and other inhabitants thereof; and the parishioners, who are the only persons sometimes who can make proof thereof, have not been allowed to be witnesses against them: it is enacted, that in all actions to be brought in any court at *Westminster*, or at the assizes, for the recovery thereof, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted. *3 W. c. 11. s. 12.*

Not answerable for indiscretion.

But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful. *Wood, b. 1. c. 7.*

[N. B. For

Churchwardens.

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[N. B. For their punishment for disobeying orders of justices when acting as *Overseers of the Poor*, or *Parish Officers*: See *Penalty on Overseers for neglect of their duty*; Title 1000.]

IX. Their indemnity on doing their duty.

If any action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office; they may plead the general issue, and give the special matter in evidence: and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs. 7 J. c. 5. 21 J. c. 12.

In *Kerchival's case*, M. 8 Car. An action was brought against the churchwardens for a presentment upon common fame of incontinency. Upon not guilty, it was found for the churchwardens, and moved, that they might have double costs: But it was resolved, that this being merely ecclesiastical, it is not within this statute; for that the statute was never intended, but where they shall be vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame. Cro. Car. 285, 286.

Clergy.

I. Clergymen.

II. Benefit of clergy.

I. Clergymen.

BY the 43 El. c. 2. Clergymen are liable to the poor rates, for their glebe and tithes. Liable to the poor,

And Mr. *Hawkins* says, clergymen are within the purview of the statutes relating to the repair of highways, in respect of their spiritual possessions; as much as any other persons whatsoever in respect of any other possessions; for the words are general, and there is no kind of intimation therein that any particular persons shall be exempted more than others. 1 Haw. 204. and to the highway.

- And to other publick charges. And it seems to be now generally settled, that clergy-men are liable to all publick charges imposed by act of parliament, where they are not specially excepted.
- Shall not farm. No clergyman shall take to farm any lands (except he have not sufficient glebe for the expences of his household); on pain of 10 l. a month, half to the king, and half to him that shall sue. 21 H. 8. c. 13.
- Shall not buy, to sell again. No clergyman shall buy to sell again any cattle, corn, fish, wool, wood, victual, or any manner of merchandize; on pain of treble value, half to the king, and half to him that shall sue; and the contract shall be void. 21 H. 8. c. 13.
- Shall not keep a tanhouse or brewhouse. No clergyman shall keep any tanhouse, or any brewhouse but for his own house; on pain of 10 l. a month, half to the king, and half to him that shall sue. *Id.*
- May be imprisoned for incontinency. The ordinary may punish clergymen for incontinency, by committing them to ward or prison by his discretion. 1 H. 7. c. 4.
- Privileges against an assault. A person laying violent hands on a clergyman, may be punished in the ecclesiastical courts. 13 Ed. 1. ff. 4. 2 Inst. 492.
- May have the benefit of clergy more than once. Clergymen in holy orders may have the benefit of clergy a second, or third time, or oftener. 2 H. H. 374, 375.
- Shall not be burnt in the hand. A clerk in holy orders shall not be burned in the hand, but shall have the same privilege as if he had been burned in the hand; and therefore shall not be drawn in question in the ecclesiastical court, to deprive him, or inflict any ecclesiastical censure upon him. 2 H. H. 383.
- Shall not serve in temporal offices. To the intent that clergymen may the better discharge their duty in celebration of divine service, and not be entangled with temporal business; if any of them be chosen to any temporal office, he may have his writ to be discharged. 1 Inst. 96.
- Shall not serve in war. Ecclesiastical persons have this privilege, that they ought not in person to serve in war. 2 Inst. 4.
- Need not appear at the torn. Ecclesiastical persons are not bound to appear at the torn, or view of frankpledge. 52 H. 3. c. 10. 9 Ed. 2. c. 3. 2 Inst. 4.
- Shall not be arrested in the church. No clergyman shall be arrested in any church or church-yard, whilst he attends to divine service, on pain of imprisonment of the offender, and ransom at the king's will, and gree to the party arrested. 50 Ed. 3. c. 5. 1 R. 2. c. 15.
- But the arrest notwithstanding (if not on a Sunday) is good in law. *Watson, c. 34. p. 344.*

The body of a clergyman may not be taken by force of any process upon a statute staple, or statute merchant. *2 Inst. 4.* Shall not be taken on a statute staple.

If an action of trespass, debt, account, or other action wherein process of *capias* lies, be brought against a clerk in holy orders, and the sheriff return that he is a clergyman beneficed, having no lay fee in which he may be summoned, in this case the plaintiff cannot have a *capias* to arrest his body, but a writ to the bishop to compel him to appear. *2 Inst. 4. Degge 157.* Nor on a *capias*.

If a person be bound in a recognizance in the chancery, or in any other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop to levy the same of his ecclesiastical goods. *2 Inst. 4.* Sheriff shall not levy on his ecclesiastical goods.

A clergyman shall be amerced only according to his lay tenement, and not after the quantity of his spiritual benefice. *Magna Chart. c. 14. Gibf. 15.* Shall not be amerced of his spiritual goods.

Distresses shall not be taken by sheriffs, or other of the king's ministers, in the inheritance of the church where-with it was anciently endowed; but otherwise if it is of late purchase. *9 Ed. 2. c. 9. 2 Inst. 4. Gibf. 18.* Distress not to be made on his spiritual inheritance.

A clergyman is not bound to pay tolls or other like customs, for his ecclesiastical goods; and if he be molested therefore, he may have a writ for his discharge. *2 Inst. 4. Gibf. 21.* Shall not pay toll of his spiritual goods.

And this not only for all the goods and merchandizes of clergymen gotten upon their church livings, but also for all goods and merchandizes by them bought, to be spent upon their rectories and church livings. *Degge 153.*

L. Coke, in his readings on the *Magna Charta*, says thus: "True it is, that ecclesiastical persons have more " and greater liberties than other of the king's subjects, " wherein to set down all would take up a whole volume " of itself, and to set down no example agreeth not with " the office of an expositor; therefore some few examples shall be expressed, and the studious reader left to " observe the rest as he shall read them in our books, and " other authorities of law." And the instances he gives, are chiefly those which are mentioned above; nevertheless I do not find any author since his time, who hath said what are those other many great privileges of the clergy; but the authors do generally adhere to these particular instances, Observation.

Clergy.

instances, probably as being supported by so great an authority: Other privileges have been abolished since his time by acts of parliament, and the adjudications of the temporal courts; and others perhaps lost by disuse; and possibly some of the instances abovementioned would have been gone likewise, or not looked upon as of so much authority, if they had not been vouched by lord Coke.

II. Benefit of clergy.

- I. Original of the benefit of clergy.*
- II. By what persons it may be demanded.*
- III. In what cases it may be demanded.*
- IV. At what time it must be demanded.*
- V. Effect of clergy allowed.*

I. Original of the benefit of clergy.

Original of the
benefit of
clergy.

ANciently princes and states, converted to Christianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions; and particularly, an exemption of their persons from criminal proceedings, in some capital cases before secular judges; which was the true original of the benefit of clergy.

The clergy increasing in wealth, power, honour, number, and interest, afterwards set up for themselves; and that which they obtained by the favour of princes and states at first, they now began to claim as their right, and a right of the highest nature, namely, by the law of God; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministration relative to the church; and likewise in respect of the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from Christ, and
from

from the pope shed abroad into all subordinate and ecclesiastical jurisdiction.

And by this means they endeavoured, and in some kingdoms and for some ages obtained, that there was a double supreme power in every kingdom: the one ecclesiastical, absolute, and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king, or civil magistrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew so burdensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom: for ecclesiastical canons never bound in *England* farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted.

And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny.

Also it was not allowed them in high treason.

But at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, lying in wait, and burning of houses (which were looked upon as hostile acts, and the authors of them therefore not intitled to the common privileges of subjects). 2 *H. H.* 323—330.

II. By what persons it may be demanded.

By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verse) have been taken to have a right to this privilege, as much as persons in holy orders. 2 *Haw.* 338.

Who may demand it.

Others besides clergymen.

But by the common law a woman could not have the benefit of clergy: but now by the statute of 3 *W. c.* 9. a woman convicted or outlawed for any felony for which a man might have his clergy, shall, upon praying the benefit

Women:

Hereticks,
Jews, Turks,
persons excom-
municate.

ness of that statute, be subject only to such punishment as a man would be in the like case.

L. Hale says, a person convicted of heresy, a Jew, or a Turk, shall not have their clergy; but a person excommunicate shall have his clergy. 2 H. H. 373.

But by the 5 Ann. c. 6. which abolished the ceremony of reading, the wall of partition (as Sir Michael Foster expresses it) between subject and subject under one and the same degree of guilt, is taken away; which measure intitled to the indulgence of the law, in common with the rest of their fellow subjects, all those who before were supposed to be under a legal incapacity for orders, as Jews, and some others were, and likewise those who in presumption of law were not qualified in point of learning, of which reading a scrap of Latin (viz. *miserere mei Deus*) which they called the *neck verse*, was commonly made the test. And from this period, the measure of punishment hath been governed by the degrees of real guilt, and not by the function or abilities of the offender. Fost. 305, 6.

But Mr. J. Blackstone in his Commentaries observes, that it hath been said, that Jews, and other infidels and hereticks, were not capable of the benefit of clergy till after the 5 Ann. c. 6. as being under a legal incapacity for orders. But he questions whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of Ann. having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act intitled to the benefit of their clergy. 4 V. 373.

Persons having
had clergy once.

By the 4 H. 7. c. 13. Every person (not being within orders) who hath once been admitted to his clergy, shall not be admitted to the same a second time.

Burning in the
hand.

And if he is convicted of murder, he shall be marked (unless he is a peer, 2 H. H. 376) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 H. 7. c. 13.

Burning not a
conclusive proof
of the conviction.

But he shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof (according to the following statutes). 2 H. H. 373.

And therefore the burning in the hand seemeth now to be of little use, and (as Sir Michael Foster observes) can scarcely be called even so much as a slight punishment; but rather

rather a piece of absurd pageantry, tending neither to the reformation of the offender, nor for example to others; to wit, burning the offender in the hand with an iron scarcely heated. *Foß. 372.*

By 34 & 35 H. 8. c. 14. The clerk of the crown, or of the peace, or of the assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of assize, or justices of the peace write to him for the names of such persons, shall certify the same with the causes of the conviction or attainder. Conviction how to be certified.

Another method is given by the 3 W. c. 9. which enacts, that the clerk of the crown, clerk of the peace, or clerk of the assize, where a person admitted to clergy shall be convicted, shall at the request of the prosecutor, or any other on the king's behalf, certify a transcript briefly and in few words containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence. *s. 7.* How it may be otherwise certified.

Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of clergy. 2 H. H. 373. How tried whether he is the same person.

III. In what cases it may be demanded.

By the 25 Ed. 3. *ß. 3. c. 4.* All manner of clerks, who shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall have the privilege of the holy church. Formerly allowed in all felonies.

Clergy was never allowed in this nation in cases of high treason, nor is it allowed on indictments of petit larceny or trespass; but by the above recited act, clergy was allowed in all treasons and felonies, except treason against the king: So that after this statute the benefit of clergy might be pleaded and allowed in all other treasons and felonies. *Hale's Pl. 230. 2 H. H. 326.* But not in treason or petit larceny.

Consequently, wherever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. *Hale's Pl. 230.* Clergy taken away by statutes.

Consequently, where a new felony is made by an act of parliament, clergy is to be allowed, unless expressly taken away by such statute. *Id.* Allowed in new felonies, unless expressly taken away.

And

And if it maketh a new felony, and takes away clergy not generally, but in such or such cases, regularly in other cases, clergy is allowable. 2 H. H. 335.

But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit of clergy, this excludes it in all circumstances, and to all intents. *Id.*

Therefore where clergy is excluded, the indictment must bring the offence within the statute.

It follows further from what hath been said, that in all cases where an act of parliament ousteth clergy, in case of any felony, the indictment must precisely bring the party within the case of the statute: otherwise, altho' possibly the fact itself be within the statute, and it may so appear upon the evidence, yet if it be not so alleged in the indictment, the party, tho' convict, shall have his clergy. 2 H. H. 336.

But altho' the case be so laid in the indictment, that it comes within the statute, to exempt the prisoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not so qualified as laid in the indictment, the jury ought to find him guilty of the felony simply, but not as to the matter laid in the indictment, and thereupon the prisoner shall be admitted to his clergy; and this is commonly done. 2 H. H. 366.

Indictment on a statute which ousteth of clergy an offence which was felony at common law.

But if the offence was capital at the common law, and a statute only excludes it from clergy; the indictment, in such case, need not conclude *against the form of the statute*, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege of exemption from such judgment. 2 Haw. 342.

Accessory.

Furthermore, from what hath been observed above, it follows, that where an act taketh away clergy from the principal, and saith nothing of the accessory; the accessories, as well before as after, shall have their clergy. 11 Co. 37. *Fost.* 355.

IV. At what time it must be demanded.

To be demanded after conviction.

By the ancient common law, the benefit of clergy was demanded as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; but this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of inquest of office, he lost his challenges to such inquest, and yet upon such inquest found, he forfeited his goods, and the profits of his lands;

lands; and therefore *Prifot* Ch. J. with the advice of the other judges, in the reign of *H. 6.* for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof: which course hath been generally observed ever since. 2 *Inst.* 164. 2 *H. H.* 378.

And this benefit of clergy may be allowed by the court in discretion, tho' the party challenge it not. *Hale's* *Pl.* 239. May be allowed tho' not demanded.

V. Effect of clergy allowed.

Persons admitted to their clergy, may be continued in prison as a further punishment, not exceeding one year. 18 *El. c.* 7. Persons having their clergy may be continued in gaol.

And by 4 *G. c.* 11. Persons convicted of offences within benefit of clergy (except receivers and buyers of stolen goods) may, instead of being whipped and burnt in the hand, be transported for seven years. May be transported.

And by the 19 *G. 3. c.* 74. When any person shall be convicted of any felony within the benefit of clergy, for which he shall be liable to be burned in the hand, the court may, if they think fit, instead thereof, impose upon the offender a moderate pecuniary fine; or otherwise, instead of such burning, in any of the cases aforesaid except manslaughter, may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped, such private whipping to be in the presence of not less than two persons, besides the offender and the officer who inflicts the same; and in case of female offenders, in the presence of females only. *f.* 3. May be fined or whipped.

Provided, that this shall not extend to deprive the court of the power now vested in them, of detaining such offender in prison for any time not exceeding one year, or of committing him to the house of correction or other publick workhouse, to be kept to hard labour for any time not less than six months, nor exceeding two years: but such person, after such burning, or after such whipping or fine, may be so detained or committed, and with such accumulated punishment, in case of escape from such house of correction or workhouse, as if this act had not been made. *f.* 4.

A person admitted to his clergy forfeits all his goods that he hath at the time of the conviction. 2 *H. H.* 388. Shall forfeit their goods.

But

But not lands.

But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. *Id.*

Credit restored.

Also it restores him to his credit; and consequently enables him to be a good witness. *2 Haw. 364.*

Actionable to call him felon.

And it is holden that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. *2 Haw. 365.*

Clerk of the peace.

Who shall appoint.

THE *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*, *37 H. 8. c. 1.*); and to take and receive the fees, profits, and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office. *1 W. c. 21. s. 5.*

Office not to be sold.

But the *custos rotulorum* shall not sell the place of clerk of the peace, or take any bond or other assurance to receive any reward, fee, or profit, directly or indirectly, to him or to any other person for such appointment; on pain that such *custos rotulorum* selling, and such clerk of the peace buying, shall be disabled to hold their respective places, and shall each forfeit double value of the thing given, to him who shall sue. *1 W. c. 21. s. 8.*

Oath.

And every clerk of the peace, before he enters upon the execution of his office, shall in open sessions take the oath following:

I A. B. do swear, that I have not, nor will pay any sum or sum of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee, or profit, directly or indirectly, to any person or persons whomsoever, for such nomination and appointment: so help me God. 1 W. c. 21. s. 9.

Qualifying.

He shall moreover take the oaths of allegiance, supremacy, and abjuration, and perform the other requisites, as other persons who qualify for offices.

No

Clerk of the peace.

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No clerk of the peace, or his deputy, shall act as solicitor, attorney, or agent, or sue out any process at any general or quarter sessions, where he shall execute the office of clerk of the peace or deputy; on pain of 50 l., to him who shall sue in twelve months, with treble costs. 22 G. 2. c. 46. s. 14.

Not to act as solicitor.

The clerk of the peace shall certify into the king's bench, the names of such as be outlawed, attainted, or convicted of felony. 34 & 35 H. 8. c. 14.

Shall certify outlawries.

He shall deliver to the sheriff, within twenty days after Sept. 29, yearly, a perfect estreat or schedule of all fines and other forfeitures in sessions. 22 & 23 C. 2. c. 22. s. 7.

Shall deliver estreats to the sheriff.

And shall also yearly, on or before the second Monday after the morrow of All Souls, deliver into the court of exchequer a perfect duplicate, certificate, and estreat of all such estreats and schedules delivered to the sheriffs; on pain of 50 l., half to the king, and half to him that shall sue. 22 & 23 C. 2. c. 22. s. 8. And moreover he may be amerced for the same by the barons of the exchequer. 3 G. c. 15.

Shall deliver estreats into the exchequer.

And he shall, upon delivery of the said estreats into the court of exchequer, take the following oath, to be administered by one of the barons:

Upon oath

YOU shall swear, That these estreats, now by you delivered, are truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances, and forfeitures, which were set, lost, imposed, or forfeited, and in right and due course of law ought to be estreated in the court of exchequer, are, to the best of your knowledge and understanding, therein contained; and that in the same estreats are also contained and expressed, all such fines as have been paid into the court, from which the said estreats are made, without any wilful or fraudulent discharge, omission, misnomer, or defect whatever. 4 & 5 W. c. 24. s. 5.

And if he shall spare, take off, discharge, or conceal any such fine or forfeiture, unless it be by rule of court, he shall forfeit treble value, half to the king, and half to him that shall sue; and shall also forfeit his office, and be incapable to be employed in any office where the revenue is concerned. 22 & 23 C. 2. c. 22. s. 9.

Penalty of concealing fines.

The clerk of the peace is not bound to enter judgment, or the like, at the suit of any, without having the fee due for the same; but if the court order any thing without suit of another, to wit, *ex officio*, there he ought to enter

Fees.

Clerk of the peace.

the same without having any fee for the entering thereof. *Crom. 159.*

Also Mr. *Crompton* says, he shall have for every recognizance of the peace taken in court 2 s., and for every release of the peace there 2 s., and for process awarded against any to find surety of the peace 2 s. *Crom. 160.*

And by 10 & 11 *W. c. 23.* he shall have only 2 s. for drawing an indictment of felony; and if it is defective he shall draw a new one *gratis*, on pain of 5 l. with full costs to him that shall sue. *f. 7, 8.*

His fees also in divers other cases are specially limited by act of parliament: and it seemeth to be one of the *desiderata* in the justices law, that the clerk of the peace's fees are not ascertained in all instances, even as those of the other clerks to justices of the peace by the statute of the 26 *G. 2. c. 14.* And withal it might be requisite to insert in the table to be agreed on for that purpose, by whom the same shall be paid in the several instances respectively, and what shall be the course of recovering the same on non-payment.

May be displaced for misbehaviour.

If any clerk of the peace shall misdemean himself in the execution of his office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him, to the justices in sessions, the said justices may, on examination and due proof thereof openly in the said sessions, suspend or discharge him from the said office; and in such case, the *custos rotulorum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment, before the next general quarter sessions, the justices in sessions may appoint one. *1 W. c. 21. f. 6.*

His duty in other matters is interspersed where it falls in amongst the other titles of this book.

Appointment of a clerk of the peace; on the 37 *H. 8. c. 1.* and 1 *W. c. 21.*

Forasmuch as the office of clerk of the peace for the county of — is now void by the death of — gentleman, late clerk of the peace for the said county; Know all men by these presents, that I — custos rotulorum of the county aforesaid, do hereby nominate, elect, appoint, and assign C. P. gentleman, an able and sufficient person, instructed and learned in the laws of England, and residing in the said county, to be clerk of the peace for the said county; to hold, execute, and enjoy

Clerk of the peace.

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enjoy the office of clerk of the peace for the county aforesaid by himself or his sufficient deputy; and to take and receive the fees, profits, and perquisites thereof, so long as he shall well, justly, and honestly demean himself in his said office. In witness whereof I the said ——— have hereunto set my hand and seal, the ——— day of ——— in the ——— year ———.

Clipping Money. See Coin.

Clockmaking. See Servants.

Cloth and Clothier. See Woollen Manufacture.

Coaches and carts used for pleasure.

BY the 25 G. 3. c. 47. The commissioners for the duties on houses and windows, shall be commissioners for the duties on coaches, carriages, and horses; and the duties thereupon are to be assessed, collected, received, and paid by such persons, and in like form and manner, and with such allowances, and under such penalties, forfeitures, and disabilities, and according to such rules and directions, as are appointed for raising the duties on houses and windows; and all powers and authorities, clauses and things, now in force relating thereto, shall be in full force in the execution of this act, unless altered thereby. *s. 7. 11.*

To be under the management of the commissioners of the window duties, and to be recovered as those duties.

And for every coach, berlin, landau, chariot, calash with *four wheels*, chaise-marine, chaise with *four wheels*, and caravan, or by what names soever such carriages now are or hereafter may be called, kept by any person for his own use, or to be let out for hire (except licensed hackney coaches), shall be paid 7 l. yearly. *s. 2.*

Duty on carriages with 4 wheels.

And by 29 G. 3. c. 49. a further additional duty shall be charged upon every person keeping *one* such carriage as aforesaid, 20 s. yearly; and where *two* are kept, 20 s. for one, and 40 s. for the other; and where *three* or more are kept, 20 s. for one, and 3 l. for each of the others. *s. 1.*

Additional duty.

And by 31 G. 3. c. 5. a further duty was imposed of 10 l. *per cent.* upon the gross amount of the said duties, which was to cease when certain debts were discharged, occasioned by the late armament respecting *Spain*. But by 33 G. 3. c. 28. *s. 24.* the said duty is made perpetual. *s. 1.*

Coaches and carts

And by 36 G. 3. c. 14. *f.* 1. a further additional duty is imposed of 10 l. *per cent.* upon the gross amount of the said duties, but not to extend to the above duty of 10 l. *per cent.* granted by 31 G. 3. c. 5.

Carriages ex-
empted.

Nor shall these additional duties extend to carriages exempted from duty by any former act; nor to licensed hackney coaches; nor to carriages let out to travel post by persons licensed to let post horses. 29 G. 3. c. 49. *f.* 1, 2. 4. 36 G. 3. c. 14. *f.* 1.

And by 35 G. 3. c. 109. *f.* 1. the additional duties imposed by 29 G. 3. c. 49. upon coaches and diligences with four wheels, kept as publick stage coaches, for the purpose of conveying passengers for hire, and duly entered as such, and for which an annual duty of 5 l. imposed by 16 G. 3. is duly paid, shall cease and be no longer paid.

Upon several appeals, the commissioners were of opinion, where an innkeeper, who keeps several four-wheel carriages, and enters the same, but keeps one in addition for no other purpose than to be made use of when any of those carriages for which the duty is paid were out of repair, and were never made use of on any other occasion, that such additional carriages were not liable to pay the duty; but the judges were of opinion their determination was wrong. 23d May 1794.

To be recovered
as former duties.

The said duties to be paid in addition to all former duties, and are to be assessed, raised, levied, and collected according to, and under the same rules and regulations as by the said act of 25 G. 3. c. 47. is directed. *f.* 9, 10. 16.

Duty on car-
riages with 2 or
3 wheels.

And by 25 G. 3. c. 47. for every calash, chaise, or chair, with *two* or *three* wheels, or by what name soever such carriages are or may be called, drawn by one or more horses, kept by any person for his own use, or to be let out for hire, shall be paid 3 l. 10 s. yearly. *f.* 2.

Penalty.

And if the person to whom such carriage shall belong, shall not have entered the same as directed by the said act of 25 G. 3. he shall forfeit 7 l. for every such carriage so used, over and above all expenses in prosecuting for the same. To be recovered before one justice, on confession, or oath of one witness, by distress, half to the informer, and half to be paid to the collector of the parish or place, to be added to the assessment of such place. 25 G. 3. c. 49. *f.* 19.

Present duties
on certain car-
riages to cease.

By 35 G. 3. c. 109. the present duty of 3 l. 10 s. charged by the 25 G. 3. c. 47. on carriages with two wheels, of the following description, shall cease. *f.* 4.

And

And in lieu thereof, for every carriage with less than four wheels, by whatsoever name called or known, and drawn by one horse and no more, which shall or may be used in the affairs of husbandry, or for carrying goods, wares, or merchandize, from place to place in the way of trade, but which shall or may be used occasionally for the conveyance of persons, and which shall be constructed wholly of wood and iron, without any covering other than a tilted covering, or any lining whatever, and without springs, and which shall have the words, A TAXED CART, and also the owner's name and place of abode; there shall be paid 10s. yearly, by the person keeping the same; which duty shall be raised, levied, collected, paid, accounted for, and applied, in the same manner, by the same persons respectively, and under the like rules, directions, and provisions, and to the like uses, as the duties on carriages with four, three, or two wheels. *§. 2.*

New duty on carriages principally used in husbandry, but occasionally used for other purposes, and drawn by one horse only.

And the said duty of 10s. shall be also liable to the additional duty of 10l. *per cent.* granted by 31 G. 3. c. 5. 35 G. 3. c. 109 *§. 7.*

Provided, that no carriage shall be deemed to be within the provisions of this act, where the first price or original sum paid for the same to the maker thereof, or for any subsequent alteration or addition (repairs excepted), exceeded 12l. *§. 3.*

Carriages of a higher price than 12 l. not within the meaning of this act.

And the owner shall mark or paint, on a black ground in white letters, or on a white ground in black letters, on the outside of the back pannel, or back part of such carriage; or if it has no back part on which the same can be put, then on the side, or some conspicuous part on the outside thereof; his christian and surname, and place of abode, and the words, A TAXED CART, in Roman letters, and in words at full length; such letters to be at least one inch in length each, and of a breadth in proportion; and shall, upon demand, produce such carriage to marked to the assessor, surveyor, or inspector; or at any meeting of the commissioners, or to any two of them, to be examined by them, respecting any of the particulars above-mentioned. And whoever shall keep or use any such carriage for the conveyance of persons, the first price whereof, or for any subsequent addition or alteration (repairs excepted), exceeded 12l. (the proof of such price shall lie on the owner); or which shall be constructed in any respect contrary to the provisions aforesaid, or shall not be marked as aforesaid; or if such person shall neglect or refuse, upon demand, to produce such carriage for examination

Owner's name, &c. to be marked on carriages.

Carriages to be produced when required.

Carriages not constructed and used according to this act, to pay 3 l. 10s. duty.

Coaches and carts

mination as aforesaid, he shall be liable to and chargeable with the said duty of 3 l. 10 s.; and the surveyor, upon notice thereof, shall certify the same in writing under his hand to two commissioners, in order to have such carriage charged 3 l. 10 s. in the assessment for that year; and the said commissioners shall thereupon cause the assessment to be rectified, and the said duty to be levied accordingly.

f. 5.

Persons riding
to fetch or carry
loads, or to
church or elec-
tions,

Provided always, that no person who shall keep any such carriage truly and without fraud to be used wholly in the affairs of husbandry or carriage of goods in the course of trade, shall be chargeable with any duty, by reason of any person riding thereon, when returning from or going to any place, to or from which any load shall have been or shall be to be carried in such carriage in the course of husbandry or trade as aforesaid; or for conveying the owner thereof, or his family, to and from divine service on Sundays; or persons going to or returning from the election of members of parliament; in case such carriage shall not have been used for any other purpose of riding thereon, save as aforesaid. f. 6.

Horses drawing
such carts not
liable to duty.

But *horses* drawing such carts as aforesaid shall not be subject to any duty whatever on account of drawing any such cart. f. 8.

Commissioners
oaths.

And no commissioner shall act until he hath taken the oaths requisite to qualify him as a commissioner of the window duties, and also the following oath, to be administered by two commissioners.

I A. B. do swear, that I will truly and faithfully execute the office of a commissioner, according to an act made in the 25th year of the reign of king George the Third, for transferring the receipt and management of certain duties therein mentioned, from the commissioners of excise and commissioners of stamps respectively, to the commissioners for the affairs of taxes; and also for making further provisions in respect to the said duties so transferred; and 29 G. 3. for granting additional duties on carriages, and will determine, without favour or affection, upon all appeals that shall be brought before me under the said act, according to the best of my skill and knowledge. So help me God.

And if any person shall act as a commissioner (except in administering the said oaths) before he shall have taken such oaths as aforesaid, he shall forfeit 100 l. 25 G. 3. c. 47. f. 13. 29 G. 3. c. 49. f. 12.

And

And the commissioners, in their precepts for naming assessors for the window duties, shall give notice that such persons are also appointed assessors for the duty on coaches.

25 G. 3. c. 47. s. 19. 29 G. 3. c. 49. s. 13.

And every assessor, surveyor, or inspector, shall take the following oath, to be administered by two commissioners:

Oath to be taken by assessors, surveyors, and inspectors.

I A. B. do swear [or affirm] that in making the assessment, which by authority of an act made in the 25th year of the reign of king George the Third, for transferring the receipt and management of certain duties therein mentioned, from the commissioners of excise and commissioners of stamps respectively, to the commissioners for the affairs of taxes; and 29 G. 3. for granting additional duties on carriages, I will charge all persons according to the best of my skill and knowledge. So help me God.

And if any such person shall presume to act before he shall have taken such oath, he shall forfeit 20 l. 25 G. 3. c. 47. s. 18. 29 G. 3. c. 49. s. 15.

And such assessors shall, within 14 days after their appointment, give or leave at the dwelling house of every person within his limits, keeping any such carriages as aforesaid, or any horse, liable to the said duties, notice in writing, requiring them to produce within 14 days next ensuing, lists in writing of the number of carriages liable to the said duties kept and used by him within such limit; the said lists to describe the greatest number of such carriages kept at any one time in the course of the year ending on the 5th day of April preceding such notice, and to express the denomination of each carriage, and its number of wheels, distinguishing which are kept for private use, and which for hire, and which are used as public stage coaches; and another list in writing of the number of horses liable to the said duties on horses, kept and used by him within such limits, such list to contain the greatest number by him kept and used in the course of the year ending on such preceding 5th day of April as aforesaid; and every person shall, after such notice so given or left, make out the said lists accordingly, and sign the same with his own hand, and deliver them to such assessor, at any time after 14 days from such notice, when he shall call for the same. And if any such person shall neglect or refuse to make out, sign, and deliver such lists within the time before mentioned, he shall forfeit 10 l.; and such assessor shall, from the best information he can obtain, make an

Notice to be given to persons keeping carriages or horses, to deliver lists thereof;

who shall deliver such lists on pain of 10 l. If no list is delivered, the assessor to make an assessment,

which shall not
be appealed
against.

assessment upon such person of the number of carriages and horses liable to the said duties so kept by him, distinguishing them in manner as aforesaid; and such assessment shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he was not at his dwelling house at the time of the delivery of such notice, nor between that day and the time limited for delivering such lists to the assessor; or unless such person shall allege and prove such other excuse for not having delivered the same, as the said commissioners shall think reasonable and sufficient. *s. 20. 27.*

Such list to contain the greatest number by him kept and used in the course of the year] Mr. Walter appealed against the assessment for a four-wheel carriage, and urged that he had given notice to the assessors that he should appeal to the commissioners to be relieved for the *second half year*, as he had not made use of his carriage from *Michaelmas to Mid-April*; so was not liable to be assessed for the second half year. The commissioners were of opinion, that he ought not to be relieved, being an *annual* assessment, and the judges were of opinion their determination was right. *23d May 1794.*

Assessors are not
bound by such
lists.

Nevertheless, such assessors shall not be bound by such lists so delivered to them as aforesaid, but shall be at liberty, if they find any carriages or horses omitted in such lists, to surcharge the same, and make a true assessment upon every person keeping such carriages or horses within their respective districts, of the real number of carriages or horses kept by each such person. *s. 24.*

Carriages omitted,
to pay
double duty.

And if any assessor, surveyor, or inspector, shall make a surcharge in respect of any carriage or horse omitted in such list, such surcharge shall be made after the rate of double the duty so omitted; one half whereof shall go to such person making such surcharge. *s. 28.*

Where no assessors
are appointed,
or neglect their duty.

And if at any time there shall be a neglect of appointment of assessors, or if they shall neglect what is required of them by this act, the surveyor or inspector of the duties on houses and windows, is authorized and required to do and perform such and the like services as are required from such assessors. *s. 17.*

Carriages or
horses kept in
different districts.

And to the end that no person may pay the said duties in more districts than one within the same year, every person who shall mean to pay for any carriage or horse in another district, shall specify in a list or declaration the particular parish or district wherein he means to pay for such carriage
or

or horse; and the said assessors shall enter the said last mentioned list at the end of their several assessments, and shall deliver the same to the surveyor of such district, in order that he may transmit the same to the commissioners of taxes. And if any person, having been assessed in one district, shall again be assessed in another for the same carriage or horse, the commissioners within such latter district, on application for that purpose, are required to alter such assessment, on proof being given that such person hath paid the duty in another place. *f. 22, 23.*

And whereas difficulties may arise in discovering lodgers Lodgers or inmates or inmates in any house, who keep carriages or horses liable to the said duties; it is therefore enacted, that the inhabitant householder of any house in which there shall be any lodger or inmate as aforesaid, shall, within a week after he shall be required by notice in writing left at his house by any assessor, surveyor, or inspector, deliver to, or leave for such assessor, a list in writing of every such lodger or inmate who shall keep any carriage or horse liable to the said duties, containing his christian and surname, and an account of every such carriage or horse to the best of his knowledge; and if he shall refuse to deliver such list, or wilfully omit or misrepresent any description which ought to be contained therein, he shall forfeit 20*l.* *f. 24.*

And such assessors shall make and deliver in writing such assessments within their respective limits to the said commissioners, within three months next after the time of their so being appointed assessors; and two of the said commissioners shall, within one month next after, or as soon after as conveniently may be, sign such assessments, and also such surcharge as shall have been made in the mean time, testifying their allowance of the same; and shall appoint two of the persons named in such assessment to be collectors, or any other two such persons as they shall think able and responsible; and shall deliver such assessments unto the said collectors, who are required to collect the said duties to assessed, and to give acquittances for the same, and for the payment thereof to the receiver general, the parish or place for which they are so appointed shall be answerable. *f. 25.*

And such surveyor or inspector may inspect any such lists and assessments before the same be signed, and alter and amend the same if they shall see just cause; and those persons in whose custody such lists and assessments shall be, are required,

Assessors to deliver their assessments in 3 months.

Collectors to be appointed.

Surveyors, &c. may inspect lists.

required, upon the request of such surveyor or inspector, to produce the same; and if such surveyor or inspector shall, upon his survey, discover that any person who ought to have been charged with the said duties, shall have been omitted or under-rated, he shall certify the same in writing under his hand, together with an account of every such carriage or horse so omitted, by way of surcharge, to two commissioners, in order to have the same rectified in the said assessment, and to cause the duties to be levied accordingly. *f. 26.*

Penalty of a
false surcharge.

Provided always, that if upon appeal it shall appear, that such surcharge was falsely and vexatiously made, such surveyor, assessor, or inspector, so surcharging shall forfeit and incur such penalties and punishments, as in and by the said acts relating to the duties on houses and windows, are inflicted on such persons for neglect of duty. *f. 32.*

Appeal.

If any person shall think himself over-rated by any assessment, charge, or surcharge, he may, giving ten days notice thereof to the surveyor or one assessor, appeal to the said commissioners or any two of them, who are to hear and determine the same; except such person appealing shall have omitted to deliver such list as aforesaid, and shall not assign sufficient cause for such omission, in which case the said commissioners may dismiss the appeal; provided that at the time of hearing such appeal, a list shall be produced upon the oath of the appellant, containing the greatest number of carriages and horses subject to the said duty, which have been kept by him within the district within the year preceding, with such description as to other districts as aforesaid; and such appeals shall be heard on the days appointed for hearing appeals respecting the duties on houses and windows; and the commissioners shall not make any abatement in such charge or surcharge, unless it shall appear upon oath that such person is over-rated; nevertheless they may strike off the penalty, on application of such appellant, although they confirm the surcharge, if it shall appear there was any doubt whether such carriage or horse was chargeable or not, and was not omitted out of such list with any intention to defraud the revenue. *f. 30, 31.*

Appeals once
determined to
be final.

And all appeals once heard and determined by two commissioners, on the days appointed for hearing appeals, shall be final and conclusive; subject nevertheless, if any person is dissatisfied, to an appeal to the judges, in the same manner as for the duties on houses and windows. *f. 33, 34.*

All

used for pleasure.

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All penalties above 20 l. are to be recovered in the courts at *Westminster*, but penalties not exceeding 20 l. may be recovered before two justices, on confession, or oath of one witness, by distress, half to the king, and half to the person who shall inform and sue for the same; and for want of sufficient distress, the offender shall be sent to prison, for any time not exceeding six months, nor less than one month. *f. 36. 39.*

Penalties, how to be recovered.

All constables are to be aiding and assisting in the execution of this act, and are to obey and execute such precepts as shall be to them directed by the said commissioners. *25 G. 3. c. 47. f. 40. 29 G. 3. c. 49. f. 20.*

Constables to be aiding and assisting.

COACHES. Duty on new carriages. See *Excise*.

COACH-MAKERS. See *Excise*.

COACHES employed as publick stage coaches. See title *Post*.

Coals.

BY the 30 C. 2. *f. 1. c. 8.* and 6 & 7 W. c. 10. and 11 G. 2. c. 15. for the admeasurement of keels, boats, waggons, wains, carts, and other carriages, used for the carrying of coals in the ports of *Newcastle, Sunderland*, and the other members of the port of *Newcastle*; and by the 15 G. 3. c. 27. for extending the like regulations to the other ports of this kingdom: if, after the admeasurement thereof by the commissioners appointed for that purpose, the marks shall be removed or altered; every person who had a hand in or was privy to the doing thereof, shall, on conviction upon the oath of one witness before one justice, forfeit 10 l. by distress, half to the king and half to the discoverer; and for want of distress, shall be committed to the common gaol for three months.

Penalties on defacing marks on keels, boats, waggons, &c. carrying coals.

And by 31 G. 3. c. 36. All such keels, boats, wains, carts, and other carriages used as aforesaid, which have been duly admeasured and marked as aforesaid, and such marks afterwards on repairing thereof or otherwise have been removed or altered, it is enacted, that the same

same

same shall be re-admeasured and marked in manner aforesaid before they are again used, on forfeiture thereof, together with the coals laden thereon. *f. 1.*

And if any person shall wilfully or designedly remove, deface, or destroy any such mark, he shall, on conviction, before one justice, on the oath of one witness, forfeit and pay not exceeding 5*l.* nor less than 40*s.*; and in default thereof, shall be committed by such justice to the house of correction nearest to the place where the offence was committed, for any time not exceeding one month, nor less than seven days. *f. 4.*

Three justices
may set the re-
tail price of
coals.

And by 17 *G. 2. c. 35.* three justices (i. *Q.*) may set the prices of coals called sea coals, brought by sea into any river, creek, or port, and sold by retail, after landing in any place to which the 16 & 17 *C. 2.* respecting the prices of coals brought into the river *Thames* doth not extend, as they shall judge reasonable; allowing a competent profit to the retailer, beyond the price paid by him to the importer, and the ordinary charges; and if any ingrosser or retailer of such coals shall refuse to sell as aforesaid, then the said justices shall appoint such persons as they shall think fit to enter into any place where such coals are stored up, and in case of refusal, taking a constable, to force entrance, and the said coals to sell at such rates, rendering to the owner the money for which they were sold, necessary charges being deducted. And if any action be brought against the justice, constable, or other person, for any thing done in pursuance of this act, he may plead the general issue; and if the verdict be found for him, he shall recover damages and treble costs. *f. 1.*

Persons in-
terested, not to
act.

But no person interested in any wharf used for the receiving and uttering coals, or that trades in the sale of coals, shall act in the setting the price of coals. *f. 2.*

Concerning the weights, measures, and prices of coals, especially in and about *London*, and also concerning the duties thereupon, there are regulations made by above forty different acts of parliament; which, not being of general concern, are here omitted.

By 26 *G. 3. c. 14. f. 2.* the coal-meters are subjected to the jurisdiction of the quarter sessions for *Surrey*.

By *f. 27.* Penalties not exceeding 5*l.* are recoverable before one or more justices of the peace for *Surrey*.

By *c. 83. f. 7.* Jurisdiction is given to the justices of *London* and *Middlesex*, as to sacks of less dimensions than prescribed by the act, and as to short measure.

And

And by c. 208. f. 2. Justices are impowered to examine witnesses on oath or affirmation.

For the destroying of coal works. See *Pines*.

Cocoa nuts. See *Cyrise*.

Coffee. See *Cyrise*.

Coin.

For matters common to this with other treasons, see title *Treason*.

COIN, in *French*, signifieth a corner, and from thence hath its name (according to *L. Coke*); because in ancient times money was square, with corners, as it is in some countries to this day. 1 *Inst.* 207. Original of the word.

Others derive this word, which in the old *French* is written *coign*; as also the Italian *cunio*, and the Spanish *cuno*, from the Greek word *κοινος*, *communis*; because money is the common mean or instrument of traffick.

But these derivations seem too artificial. The word doth properly signify a wedge, as the Latin *cuneus*; and hath a verb belonging to it in the several languages: and is translated to lawful money; either from the form of a wedge, ingot, or lingot (*lingueta*), in which bullion was transported from all antiquity; or else from the instrument, a wedge or chissel, with which, in trade, these lingots were occasionally cut to the weight required, as they are at this day in the *East Indies*, with sheers.

No other weight, than such as shall be stamped or marked by the officer appointed by his majesty for that purpose, shall be sufficient in law for determining the weight of the gold and silver coin. And if any person shall counterfeit such stamp or mark, or knowingly sell any weight with the impression of such counterfeit stamp thereon; or shall wilfully increase or diminish any such weight after it has been so stamped or marked; or use any such weight in weighing the gold and silver coin of this realm, knowing the same to be so increased or diminished: he shall, on conviction before two justices, forfeit any sum not exceeding 50 l. half to the king, and half to him that shall inform Weights for coin.

form or sue; and in default of payment, he shall be committed to the common gaol or house of correction for any time not exceeding three months. 14 G. 3. c. 92.

Denominating
the value of
coin.

The legitimization of money, and the giving it its denominated value, is one special part of the king's prerogative. 1 H. H. 188.

But in order to fix the value, the weight and fineness of the metal are to be taken into consideration: When a given weight of gold and silver is of a given fineness, it is then of the true standard, and called Sterling metal, and of this sterling metal all the coin of the kingdom must be made by the statute of the 25 Ed. 3. st. 5. c. 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin below or above the sterling value. 1 Blackst. 278.

Legitimizing
foreign coin.

And the king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 H. H. 192.

And therefore both *English* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*, 1 Inst. 207.

But of this latter sort there is none at present in *England*; *Portugal* money being only taken by consent, as approaching nearest to our standard, and falling in tolerably well with our divisions of money into pounds and shillings, but no person is obliged to take it. 4 Blackst. 89.

Copper coin.

And only gold or silver coin, and not brass or copper, are within the denomination of *the king's money* mentioned in the statute of 25 Ed. 3. st. 5. c. 2. 1 Haw. 42.

And no person can be enforced to take in payment any money but of lawful metal, that is of silver or gold. 2 Inst. 577. Except for sums under sixpence. 1 H. H. 195.

Counterfeiting
the coin of this
realm.

By the statute of 25 Ed. 3. st. 5. c. 2. it is made treason to counterfeit the coin of this realm: That is to say, whether the person utter it or not. 3 Inst. 16. 1 Haw. 42.

Counterfeiting
foreign current
coin.

And if any person shall falsely forge and counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and shall be current therein by the king's consent; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. 1 Mar. jess. 2. c. 6.

By the 5 *El. c. 11.* Clipping, washing, rounding, or filing, for lucre or gain, any the proper coin of this realm, or the dominions thereof, or of any other realm current within this realm by proclamation, shall be adjudged treason in the offenders, their counsellors, consenters, and aiders. Clipping, washing, filing.

And by the 18 *El. c. 1.* If any person shall, for lucre or gain, by any art, ways, or means, impair, diminish, falsify, scale, or lighten, the proper coin of this realm, or any the dominions thereof, or the coin of this realm allowed to be current (at the time of the offence committed) by the king's proclamation; he, his counsellors, consenters, and aiders, shall be guilty of treason. Impairing, diminishing, falsifying.

And if any person (not employed in the mint) shall mark on the edges any the current coin of this kingdom; or, if any person whatsoever shall mark on the edges any of the diminished coin of this kingdom, or any counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto those on the edges of money coined in the mint; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. 8 & 9 *W. c. 26. s. 3.* Prosecution to be in six months. 1 *An. st. 1. c. 9.* Edging.

Also, if any person shall colour, gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling any the current coin of this kingdom, or any round blanks of base metal, or of coarse gold or coarse silver, of a fit size and figure to be coined into counterfeit milled money, resembling any the gold or silver coin of this kingdom; or if any person shall gild over any silver blanks of a fit size and figure to be coined into pieces, resembling the current gold coin of this kingdom; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. 8 & 9 *W. 26. s. 4.* Prosecution to be in three months. *s. 9.* Colouring.

And by the 15 & 16 *G. 2. c. 28.* If any person shall wash, gild, or colour any lawful or counterfeit silver coin called a shilling or sixpence, or add to or alter the impression, or any part thereof, on either side, with intent to make such shilling or sixpence resemble a guinea or half guinea; or shall any way alter or colour halfpennies or farthings, with intent to make them resemble a shilling or sixpence: he, his counsellors, aiders, and abettors, shall be guilty of high treason. Prosecution to be in six months.

L. Hale, speaking of copper halfpence and farthings, makes it a query, whether the counterfeiting of them be not Counterfeiting halfpence and farthings.

not treason within the Statute of 25 Ed. 3. but inclines to the negative. 1 H. H. 195. 211, 212.

And with this agrees the sense of the legislature, in the Statute of 15 & 16 G. 2. c. 28. which reciting, that whereas the counterfeiting of the copper coin of this kingdom is only a misdemeanor, and the punishment often very small, therefore enacteth, that if any person shall coin or counterfeit brass or copper halfpence or farthings; he, his counsellors, aiders, and abettors, shall suffer two years imprisonment, and find sureties for their good behaviour for two years more. s. 6.

And further, by the 11 G. 3. c. 40. If any person shall make, coin, or counterfeit, any of the copper monies of this realm, commonly called an halfpenny or farthing; or shall buy, sell, take, receive, pay, or put off any counterfeit copper money, not melted down or cut in pieces, at or for a lower rate or value than by its denomination it doth import or was counterfeited for; he shall be guilty of felony [but within clergy]. And one justice, on complaint upon oath that there is just cause to suspect, that any person hath been concerned in counterfeiting the copper monies of this realm, may by his warrant cause the dwelling house, room, workshop, out-house, yard, garden, or other place, belonging to such suspected person, to be searched for tools and implements for coining such copper monies: And if any such tools or implements shall at any time be found hid or concealed in any place so searched, or be found in the custody of any person whatsoever not employed in his majesty's mint, nor having the same by some lawful authority; it shall be lawful for any person whatsoever discovering the same, to seize such tools or implements, and carry the same forthwith to a justice, who shall cause the same to be secured and produced in evidence against any person who shall be prosecuted for any the offences aforesaid, in some court proper for the determination thereof; and after they shall have been produced in evidence, as well the same so produced, as the other so seized and not produced in evidence, shall forthwith, by order of the court, or by order of a justice, if there shall be no trial, be defaced and destroyed, or otherwise disposed of as such court or justice shall direct.

Counterfeiting
coin not cur-
rent.

If any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm; he, his procurers, aiders, and abettors shall be guilty of misprision of high treason. 14 El. c. 3.

If

If any person shall bring false money into the realm, counterfeit to the money of *England*, knowing the same to be false, to merchandise or make payment, in deceit of the king and his people; he shall be guilty of high treason. 25 *Ed. 3. st. 5. c. 2.*

Bringing in false money.

Also, if any person shall bring from the parts beyond the sea, any forged and counterfeit money like to the gold or silver coin of foreign realms, current in payment within the king's realm by the king's sufferance and consent, knowing the same to be false and counterfeit, to the intent to utter or make payment of the same within this realm, by merchandizing or otherwise; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. 1 & 2 *P. & M. c. 11. s. 2.*

Note; This must be brought from a foreign nation, and not from *Ireland*, or other place subject to the crown of *England*; because the counterfeiting there, is punishable by the laws of our king, as much as in *England*. 1 *Haw.* 43.

Sir *Michael Foster* observing upon these offences (and of the offence above mentioned, of counterfeiting foreign current coin) says, prosecutions for importing money counterfeit to the similitude of *English* coin have been very rare; and for the offences of counterfeiting foreign coin legitimated by proclamation, and of importing such coin, there can be none, as things stand at present, till the crown shall be advised to legitimate some species of foreign coin. I know of none (says he) now current among us that is legitimated, and most probably none will. For if the offences of counterfeiting and diminishing foreign coin, and of importing such counterfeit and diminished coin, which are great evils and daily growing, were made more penal than they are at present, he says he knows of no good end that could be answered by legitimating any species of it; on the other hand, there seem to be great inconveniences that would attend it. *Fest. 227.*

If any prefs for coinage shall be found in the custody of any person (other than the officers of the mint), it shall be seized for the king's use; and every person in whose custody such prefs shall be found, shall forfeit 500 l., half to the king, and half to the informer. 7 & 8 *W. c. 19. s. 4.*

Coining prefs and tools.

And by 8 & 9 *W. c. 26.* No person, unless employed in the mint, shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mend-

ing of any puncheon, counter-puncheon, matrix, stamp, dye, pattern, or mould, of steel, iron, silver, or other metal, or of spaud, or fine founders earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, or resemblance of both or either of the sides or flats of any gold or silver coin, current within this kingdom; nor shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any edger or edging tool, instrument, or engine, not of common use in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in the mint; nor any press for coinage; nor any cutting engine for cutting round blanks, by force of a screw, out of flatted bars of gold, silver, or other metal; nor shall knowingly buy or sell, hide or conceal, or without lawful authority or sufficient excuse for that purpose, knowingly have in his house, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, dye, edger, cutting engine, or other tool or instrument before mentioned; on pain that such person, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason. *f. 1.* Prosecution to be in three months. *f. 9.* But by the 1 *An. st. 1. c. 9. f. 2.* The prosecution for offences by making or mending, or beginning or proceeding to make or mend any coining tool or instrument in the abovesaid act prohibited, or by marking of money round the edges with letters or grainings, may be commenced at any time within six months.

.And if any person shall, without lawful authority, knowingly convey, or assist in conveying out of the mint, any puncheon, counter-puncheon, matrix, dye, stamp, edger, press, or other tool, engine, or instrument used for or about the coining of monies there, or any useful part of such tool or instrument; he, his counsellors, procurers, aiders, or abettors, shall be guilty of high treason. 8 & 9 *W. c. 26. f. 2.* Prosecution to be in three months. *f. 9.*

And if any puncheon, dye, stamp, edger, cutting engine, press, flask, or other tool, instrument, or engine, used or designed for coining or counterfeiting gold or silver monies, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody, or possession of any person not employed in the mint, nor having the same by some lawful authority: any person
6
whatsoever

whatsoever discovering the same, may and shall seize the same, and carry them forthwith to some justice of the peace to be by him secured, to be produced in evidence, against any person who shall be prosecuted for any such offence. And after they have been produced in evidence, they shall forthwith by order of the court (or by order and in the presence of a justice of the peace, if there hath been no trial) be totally defaced and destroyed. 8 & 9 W. c. 26. f. 5.

For the better preventing the clipping, diminishing, or impairing the current coin, if any person shall buy or sell, and knowingly have in his custody or possession, any clippings or filings of the current coin of this kingdom; he shall forfeit the same, and also 500 l. half to the king, and half to the informer; and shall be branded in the right cheek with the letter R; and be imprisoned till the payment of the 500 l. 6 & 7 W. c. 17. f. 4. Selling of clippings.

And if any shall cast ingots or bars of silver, in imitation of *Spanish* bars or ingots, or stamp them in likeness of the *Spanish* stamp, he shall forfeit the same, and also 500 l. half to the king, and half to the informer. 6 & 7 W. c. 17. f. 3. Bullion.

And if any broker, not being a trading goldsmith or refiner of silver, shall buy or sell any bullion or molten silver, he shall be imprisoned six months. f. 7.

And the warden of the company of goldsmiths, with two of the court of assistants within the bills, and two justices elsewhere, may enter into the house, room, or workshop of any person suspected, and with the help of a constable, may break open any door, box, trunk, chest, cupboard, or cabinet, to search for bullion suspected to be concealed; and if found, they shall seize the same, and the person in whose possession it shall be found: and the said wardens, assistants, and constables, within the bills, shall carry him before the next justice, which justice, and the said two justices elsewhere, may examine him; and if he shall not prove by the oath of himself, or of a credible witness, that it is lawful silver, and was not current coin, nor clippings thereof, he shall be committed; and if on his trial he shall not prove the same by one witness, he shall be imprisoned six months. f. 8.

And no person shall ship any molten silver or bullion, without certificate from the court of the lord mayor and aldermen of *London*, and oath made before them by the owner and two witnesses, that it is foreign bullion, and that no part of it was the coin of this realm, or clippings thereof,

thereof, nor plate wrought within this kingdom; on pain that the same shall be forfeited, half to the king, and half to the officer or other person who shall seize the same. And the owner shall forfeit double the value thereof, half to the king, and half (with costs) to him that shall sue. And the captain or master of a ship (if it belong to a subject), permitting the same, shall forfeit 200*l.* to him who shall sue; and if it is a king's ship, he shall moreover forfeit his employment. And if any officer of the customs shall grant a cocquet for exporting the same, before such certificate and entry thereof made; he shall forfeit 200*l.* and his office. And in case of seizure of such bullion, or action brought for the forfeitures, the proof shall lie upon the owner; and for want of proof it shall be forfeited. *7 & 8 W. c. 19. s. 6, 7, 8, 9.*

And if any bullion is entered to be exported, other than in the name of the true owner or importer; the exporter shall forfeit the same, or the value thereof; half to the king, and half to him who shall seize or discover the same. *6 & 7 W. c. 17. s. 14.*

Blanched copper and other base metal.

And whereas several mixtures of metals have been invented in imitation of gold and silver, and blanching copper is principally made use of in imitation of silver, and seldom, if ever, for any honest or good purpose, it is enacted, that if any person shall blanch copper for sale, or mix blanching copper with silver, or knowingly buy or sell or offer to sale blanching copper alone, or mixed with silver; or shall knowingly and fraudulently buy or sell or offer to sale any malleable composition or mixture of metals or minerals, which shall be heavier than silver, and look, and touch, and wear like standard gold, but be manifestly worse than standard; he shall be guilty of felony, and shall suffer death as in case of felony. Prosecution to be in three months. *8 & 9 W. c. 20. s. 6, 9.*

Paying coin under value.

If any person shall take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever, unlawfully diminished, and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import, or was coined or counterfeited for; he shall be guilty of felony, and suffer death as in case of felony. Prosecution to be in three months. *Id.*

uttering false money.

If one person counterfeits, and by agreement before the counterfeiting, another person is to take off and vent the counterfeit money, such other is an aider and abettor, and consequently a principal traitor (for in high treason there are no accessories). *1 H. H. 214.*

If one person counterfeits, and another (knowing that he did so) puts it off, but without any such previous agreement; such other person seems to be all one with a receiver of him, because he maintains him. 1 H. H. 214.

If one person counterfeits, and another person knows that he did so, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is misprision of treason. *Id.*

But, formerly, where it did appear, that the utterer of counterfeit money knew who counterfeited it, but barely uttered it for his own benefit, although he knew it was counterfeit, yet it was only a cheat and misdemeanor, punishable by fine and imprisonment (contrary to the opinion in *Stanford and Dalton*); but now by the statute of 15 G. 2. c. 28. it is enacted, that whereas the uttering false money is a crime frequently committed all over the kingdom, and the offenders are not deterred, because it is only a misdemeanor, and the punishment generally small, tho' there is reason to believe that the utterers are often the coiners, or in confederacy with them; therefore, if any person shall tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence suffer six months imprisonment, and find sureties for his good behaviour for six months longer; for the second offence, shall suffer two years imprisonment, and find sureties for two years more; and for the third offence, shall be guilty of felony without benefit of clergy. *f. 2.*

And if any person shall tender in payment any counterfeit money (knowing it to be so), and shall either the same day, or within ten days after, knowingly tender other false money in payment, or at the time of such tendering have more in his custody; he shall for the first offence suffer a year's imprisonment, and find sureties for his good behaviour for two years more; and for the second offence, shall be guilty of felony without benefit of clergy. *f. 3.*

Persons guilty of the said crimes shall be tried and convicted in such manner as is used against offenders for counterfeiting the coin: and the clerk of assize, or clerk of the peace, where the first conviction was had, shall certify the same by a transcript in few words, containing the tenor of such conviction (for which he shall have 2s. 6d.); and such certificate being produced in court, shall be sufficient proof of the former conviction. Prosecution to be in six months. *f. 5. 9.*

Note; By this it should seem, that the justices of the peace in sessions have power to try such offenders; otherwise this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present: albeit no power is given to the sessions by any express words in this statute to hear and determine such offences.

By the statute 9 G. 3. c. 37. If any churchwarden or overseer of the poor, or person authorized by him, shall make any payments to the poor in any base or counterfeit money; one justice, on complaint, may summon the offender, and on his non-appearance, or confession, or proof of the offence by the oath of one witness, may adjudge him to forfeit not less than 10 s., nor more than 20 s., to be levied by distress, and to be applied to the use of any poor person or persons of the parish or place respectively as the justice shall appoint. *s. 7.*

Having false
money in pos-
session.

False money,
what to be
done with.

If false or clipt money be found in a man's hands; if he be suspicious, he may be arrested till he have found his warrant. 3 *Inst.* 18. *Hale's Pl.* 21. 1 *Haw.* 43.

Any person to whom any *silver* money shall be tendered, any piece whereof shall be diminished, otherwise than by reasonable wearing; or that by the stamp, impression, colour, or weight thereof, he shall suspect to be counterfeit; may cut, break, or deface such piece: and if any piece so cut, broken, or defaced shall appear to be a counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful money, the person that cut, broke, or defaced the same, shall receive the same at the rate it was coined for. And if any question arise, whether the piece so cut be counterfeit, it shall be determined by the next justice of the peace, or chief magistrate in a corporation. 9 & 10 W. c. 21. *s. 1.*

And if any person to whom any *gold* money shall be tendered, any piece or pieces whereof shall be diminished otherwise than by reasonable wearing; or that by the stamp, impression, colour, or weight thereof, he shall suspect to be counterfeit; may cut, break, or deface such piece or pieces: and if any piece so cut, broken, or defaced shall appear to be diminished otherwise than by reasonable wearing, or counterfeit; the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful money, the person that cut, broke, or defaced the same, shall receive the same at
the

the rate it was coined for. And if any question shall arise, whether the piece so cut be counterfeit or diminished in manner aforesaid, it shall be determined by the mayor or other head officer in a corporation, and elsewhere by one justice inhabiting near where the tender was made. 13 G. 3. c. 71.

And if any counterfeit or unlawfully diminished money shall be produced in any court of justice, either in evidence or otherwise, the judge shall cause it to be cut in pieces in open court, or in the presence of a justice of the peace, and then to be delivered to or for the person to whom it belongs. 8 & 9 W. c. 26. s. 5.

By the 3 Ed. 1. c. 15. Persons taken for false money Bail. are not bailable by justices of the peace.

But they must take the examinations and informations, and bind over the witnesses to the proper court, and commit the persons accused. 1 H. H. 372.

It is not necessary there should be two witnesses in cases of counterfeiting the coin, as it is in other high treasons; but persons may be convicted according to the course of the common law, by one witness only. 1 H. H. 318. 328.

The judgment for high treason, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 Haw. 444.

But it is generally provided by the several statutes, that this shall work no corruption of blood, nor loss of dower.

Every person who shall apprehend any person who hath counterfeited any of the current [gold or silver] coin of this realm; or that for lucre or gain hath clipped, washed, filed, or any way diminished the same; or hath altered shillings and sixpences to make them resemble guineas and half guineas, or halfpennies and farthings to make them look like shillings and sixpences; or shall bring or cause to be brought into this kingdom, any clipped, false, or counterfeit coin; and prosecute such person to conviction: every such person shall have a reward of 40*l*. In order to which, the judge shall give him under his hand, a certificate certifying the conviction, and the county in which it was made, and that the offender was taken and prosecuted by such person; and if any dispute shall arise between several persons apprehending and prosecuting, the judge shall in the certificate appoint the reward to be paid amongst them, in such proportion as he shall think reasonable. The said certificate to be tendered to the sheriff, who shall thereupon pay the same without fee, within one

Reward for convicting an offender.

Coin.

month after such tender and demand, on pain of forfeiting to the party double the sum, with treble costs. The sheriff to be repaid out of the treasury. 6 & 7 W. c. 17. s. 9, 10, 11. 15 & 16 G. 2. c. 28. s. 7.

In like manner a reward of 10l. shall be paid, for apprehending and convicting a counterfeiter of the copper money. 15 & 16 G. 2. c. 28. s. 7.

Pardon to accomplices informing.

If any person being out of prison, shall be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the [gold or silver] coin of this realm, and afterwards discover two or more persons who have committed any of the said crimes, so as two or more be convicted; he shall have the king's pardon, and if he is an apprentice he shall be made a freeman. 6 & 7 W. c. 17. s. 12.

In this clause at large in the statute, is an instance of that multiplicity of words, which is sometimes ridiculed in our laws; where it is said, *two or more person or persons*, and again, *two or more of the person or persons*.

Further; if any person being out of prison, shall be guilty of altering sixpences or shillings, to make them look like half guineas or guineas; or altering farthings or half-pennies, to make them look like sixpences or shillings; or of counterfeiting brass or copper half-pennies or farthings; or of uttering false money,—and afterwards discover two or more persons who have committed any of the said crimes, so as two be convicted; he shall have the king's pardon. 15 & 16 G. 2. c. 28. s. 8.

Charges of prosecuting.

The commissioners of the treasury may issue a sum not exceeding 600l. yearly, for the charges and expences of the officers and others employed in the prosecution of offences in counterfeiting, diminishing, or otherwise concerning the current coin of this realm. 7 Ann. c. 24. s. 4. 15 & 16 G. 2. c. 28. s. 10.

Commitment.

Without warrant.

ANCIENTLY there were more felons committed to gaol without mittimus in writing, than were with it: such were all the commitments by constables, watchmen, and private persons arresting for felony, and bringing to the common gaol, long before there were any justices of the

the peace; and vet mittimus's are not of so ancient date even as they. 1 H. H. 610.

But now, since the *habeas corpus* act, a commitment in writing seems more necessary than it was in former times; otherwise the prisoner may be admitted to bail upon that act, whatsoever his offence may have been.

When a statute appoints imprisonment, but limits no time when, it is to be understood that he shall be imprisoned presently. *Dalt. c. 170.*

Concerning which I will set forth,

- I. Who may be committed.
- II. To what place.
- III. The form of the commitment.
- IV. Charges of the commitment.
- V. That the gaoler shall receive the prisoner.
- VI. Shall certify the commitment.
- VII. Commitment discharged.

I. Who may be committed.

There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 Haw. 116.

Persons not bailable, or not finding bail.

And it is said, that wheresoever a justice is impowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply. *Id.*

Persons guilty of contempt.

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 H. H. 121.

Persons charged with felony.

But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which tho' there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, tho' it be by misadventure, or self-defence

Persons charged on suspicion.

(which

Commitment.

(which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and therefore he must be committed, or at least bailed. 2 *H. H.* 121.

Persons not paying their fine.

But commitment by the justices of the peace almost in all cases (except for the peace, good behaviour, felony, or higher offences) is but to retain the party till he hath made fine to the king; and therefore if he offer to pay it, or find sureties by recognizance to pay it, he ought not to be committed, but to be delivered presently. *Dalt.* c. 170.

In other cases.

And in general, wherever a justice is impowered to bind a person over, or to cause him to do a certain thing; he may commit him to gaol, to remain there till he shall comply, if such person being in his presence shall refuse to be bound, or to do such thing. 2 *Haw. c.* 16. *f.* 2.

II. To what place.

To the gaol.

By the 5 *H.* 4. c. 10. All felons shall be committed to the common gaol, and not elsewhere.

House of correction.

But by the 6 *G.* c. 19. Vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

Stocks.

And they may commit other offenders to the stocks, or other custody, by particular statutes.

Different county.

Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt.* c. 170.

Yet if he escapes, and is taken on fresh suit, in another county, he may be carried back to the county where he was first taken. *Id.*

Also by the 24 *G.* 2. c. 55. If a person is apprehended, upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed (or if bailable, bailed) by the justices in such first county.

III. Form

III. Form of the commitment.

It must be in writing, either in the name of the king, In whose name. and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice (L. Hale says) in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 *H. H.* 122.

It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name. 1 *H. H.* 577. The party's name, if known.

It is safe, but not absolutely necessary, to set forth, that Oath. the party is charged upon oath. 2 *Haw.* 120.

It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise if it contain no cause at all, if the prisoner escape it is no offence at all: whereas if the mittimus contained the cause, the escape were treason or felony, though he were not guilty of the offence; and therefore for the king's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst.* 52. Cause.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

Also, it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony *for the death of such an one*, or for burglary *in breaking the house of such an one*; and the reason is, because it may appear to the judges of the king's bench, upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was for felony. 1 *H. H.* 584.

And

Commitment.

And although it is not necessary to state in a warrant of commitment on a charge of felony, that the act was done "feloniously," yet unless it sufficiently appears on the facts stated in the commitment to be in law a felony, the judges of the court of king's bench are bound to bail the defendant. *H. 28 G. 3. K. v. Fudd, 2 Durnf and East, 255.*

Not to be in the disjunctive.

T. 17 G. 3. K. v. Evered. Two justices committed Robert Collebale, an apprentice, for running away from his master. An objection was taken to the form of the commitment, for the uncertainty thereof, which run thus: "As an apprentice or servant, for disobeying his indentures or articles." And it was insisted, that this being in the disjunctive could not be supported, because justices have not a power to commit servants generally, though they may commit servants of a particular description.—In answer thereto it was contended, that though the warrant ran in the disjunctive; yet as he now stated himself to be an apprentice, he was under that description liable.—L. Mansfield said, that the objection to the warrant of commitment as running in the disjunctive must undoubtedly prevail.—The counsel for the prosecution consented to the prisoner's discharge. *Cal. Caf. 26.*

There was another objection to this commitment, (viz.) the apprentice having been bound when under age, that therefore the indenture was voidable by him when he came of age. But this was over-ruled by the court; he having run away, would make use of his offence to avoid the punishment.

Conclusion.

It must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. *2 H. 120. 2 H. H. 123.*

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged, but the wrong conclusion shall be rejected. *1 H. H. 584.*

It is also to be observed, that a commitment grounded on an act of parliament, ought to be conformable to the method prescribed by it. As where the overseers were committed for refusing to account, and the warrant concluded in the common form, until they be duly discharged according to law, upon the return of an *habeas corpus* the court

court held the commitment void, because the warrant ought to have concluded, there to remain until he shall account, as the 43 *El. c. 2.* doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the first case, the commitment must be, until discharged according to law; but in the latter until he comply. 2 *Haw. Not.* 33.

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the court. *Dalt. c. 170.* Where no time is limited.

It must be under seal; and without this, the commitment is unlawful, the gaoler is liable to false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. 1 *H. H.* 583. Seal.

But this must not be intended of a commitment by the sessions, or other court of record; for there the record itself or the memorial thereof, which may at any time be entred of record, are a sufficient warrant, without any warrant under seal. 1 *H. H.* 584. By the sessions.

It should also set forth the place at which it is made (that it may appear to be within the jurisdiction of the justice). 2 *Haw.* 119. Place.

It must also have a certain date, of the year and day. 2 *H. H.* 123. Time.

IV. Charges of the commitment.

By the 3 *J. c. 10.* Every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither: And if any such person so to be committed, shall refuse at the time of his commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same; then such justice shall, by writing under his hand and seal, give warrant to the constable of the hundred, or constable of the township where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying Charges to be paid by the offender if able.

veying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish where such goods shall be; the overplus to be delivered to the party.

If not able, to be paid out of the county rate.

And by the statute of the 27 G. 2. c. 3. When any person, not, having goods or money in the county where he is taken, sufficient to bear the charges of himself and of those who convey him, is committed to gaol, or to the house of correction, by warrant from a justice, then on application by the constable or other officer who conveyed him to any justice for such county or place; [such justice] shall upon oath examine into and ascertain the reasonable expences, and shall without fee by his warrant order the treasurer to pay the same. But in *Middlesex* the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

Except in *Middlesex*.

Note; By the *habeas corpus* act, the charge of conveying an offender is limited not to exceed 12 d. a mile; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus*, that he shall not escape by the way, which renders guards in that case not so necessary.

V. Gaoler shall receive the prisoner.

If the gaoler shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same, by the justices of gaol delivery. 4 Ed. 3. c. 10. *Dalt.* c. 170.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken; and that town shall be charged with the keeping of him, until the next gaol delivery: or the person that arrested him, may in such case keep the prisoner in his own house, as it seemeth. *Dalt.* c. 170.

But in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. 1 *Haw.* 118.

VI. The gaoler shall certify the commitment.

By the 3 H. 7. c. 3. The sheriff or gaoler shall certify the commitment to the next gaol delivery.

VII. Commitment discharged.

It seems that a person legally committed for a crime certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but the king, till he be acquitted on his trial, or having an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of gaol delivery. But if a person be committed on a bare suspicion, without an indictment, for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be safely dismissed without any farther proceeding, so that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory, where there can be no principal; and it would be hard to punish one for a contempt in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless.
2 Haw. 121.

Mittimus for felony.

Westmorland. J P. esquire, &c. one of the justices of our lord the king, assigned to keep the peace in the said county, and also to bear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the keeper of the gaol of our said lord the king at ——— in the said county, or to his deputy there, and to each of them, greeting: Whereas A. O. late of ——— in the said county, labourer, hath been arrested by the constable of ——— in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of 40 s. the property of A. P. of ——— in the said county, yeoman: Therefore, on the behalf of our said lord the king, I command you and each of you, that you or one of you receive the said A. O. into your custody in the said gaol, there to remain till he be delivered from your custody by the law and custom of England.

Commitment.

England. Given under my hand and seal at _____ in the said county, the _____ day of _____ in the _____ year of the reign of our said lord _____.

Another.

Westmorland. J. P. esquire, &c. To the keeper of the common gaol at _____ in the said county, or to his deputy there: These are in his majesty's name to charge and command you, that you receive into your said gaol the body of A. O. late of _____ in the said county, yeoman, taken by A. C. constable of _____ in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing _____. And that you safely keep the said A. O. in your said gaol, until the next general gaol delivery for the said county, [if he be not bailable; or if bailable, then thus,] until he shall thence be delivered by due course of law. And herein fail you not, &c.

Another.

Westmorland. J. P. esquire, &c. To the keeper of _____ I send you herewithal the body of A. O. late of _____ in the said county, labourer, brought before me this present day, and charged upon the oath of A. P. of _____ in the said county _____ with the felonious taking and carrying away forty sheep, the property of _____ which also he hath confessed upon his examination before me [by which he is not bailable]: Therefore these are on the behalf of our said lord the king to command you, that immediately you receive the said A. O. and him safely keep in your said gaol, until he be thence delivered by the due order of law. Hereof fail you not, as you will answer for your contempt at your peril. Given under my hand and seal at _____ &c.

Or thus, in the king's name.

Westmorland. GEORGE the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth: To the keeper of our gaol at _____ in our said county of W. or to his deputy, greeting: Whereas A. O. late of _____ in our said county, yeoman, is arrested for suspicion of felony, by him, as it is said, committed, in feloniously taking and carrying away _____ of

Commitment.

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of the value of — the property of — We therefore command you, and each of you, that you receive him the said A. O. into your custody in our said gaol, or that one of you do receive him, there to remain till he be delivered from your custody, according to the law of our kingdom of England. Witness J. P. esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed at — in the said county, the — day of — in the — year of our reign.

Form of a warrant of commitment in general.

Westmorland. J. P. esquire, one of the justices of our lord the king, assigned to keep the peace within the said county. To the constable of — in the said county, and to the keeper of — at — in the said county.

These are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said — the body of A. O. charged upon the oath of A. P. of — in the said county — before me with [here specify the offence]. And you the said keeper are hereby required to receive the said A. O. into your custody in the said — and him there safely to keep [here set forth the time], or until he shall be thence delivered by due course of law. Herein fail you not. Given under my hand and seal the — day of — in the — year of the reign of his said majesty king George the third.

Form of commitment of a person for further examination.

Westmorland. { To the keeper of the common gaol at — in the said county.

***R**ECOLVE into your custody the body of A. O. herewith sent you, brought before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, by A. C. constable of — being charged on the oath of A. I. of — in the said county, yeoman, on a violent suspicion of [here set forth the offence], and him safely to keep in your custody for further examination, and until he shall be discharged by due course of law. Given under my hand and seal the — day of —.*

Common prayer.

Impugners of
the book of
common
prayer.

IMPUGNERS of the form of worship in the church of *England*, established by law, and contained in the book of common prayer; of the 39 articles; of the rites and ceremonies of the church; and of episcopal government; shall be excommunicated *ipso facto*, and not restored but by the bishop or archbishop on their repentance. *Can.* 5, 6, 7.

Ministers derogating from the book of common prayer.

If any parson, vicar, or other minister, that ought to use the common prayer, or to minister the sacraments, shall refuse to do the same, or (wilfully standing in the same) shall use any other form, or shall speak any thing in derogation of the same book or of any thing therein contained; he shall, on conviction, for the first offence forfeit to the king one year's profit of all his spiritual promotions, and be imprisoned for six months; for the second offence, shall be deprived of all his spiritual promotions, and be imprisoned for a year; and for the third offence, shall be deprived of all his spiritual promotions, and be imprisoned during life. And if he has no spiritual promotion, he shall for the first offence be imprisoned for a year; and for the second offence, during life. *1 El. c. 2. s. 4—8.*

But this shall not restrain the spiritual court from proceeding against these offenders; and they may be deprived by the said court, according to the course of the spiritual law, for the first offence. *Id. s. 16. 23. 1 Haw. 9.*

Any person depraving the book of common prayer.

If any person whatsoever shall in plays, songs, or by other open words, speak any thing in derogation of the same book, or any thing therein contained; or shall by open fact cause or procure any minister in any place to say common prayer openly, or to minister any sacrament, in other form, or shall interrupt or let any minister to say the said common prayer; he shall (being indicted for the same at the next assizes) forfeit to the king for the first offence 100 marks, and for the second 400 marks; (which if not paid in 6 weeks after conviction, he shall suffer 6 months imprisonment for the first offence, and 12 months for the second;) and for the third offence shall forfeit all his goods and chattels, and be imprisoned during life. *1 El. c. 2. s. 9, 10, 11, 12, 13. 20.*

Resident incumbent to read the common prayer once a month.

Where an incumbent resides upon his living, and keeps a curate, the incumbent himself (not having lawful impediment

impediment to be allowed by the bishop) shall at least once a month openly and publickly read the common prayer, and (if there be occasion) administer the sacraments, and other rites of the church; on pain of 5 l. to the poor, on conviction by confession, or oath of two witnesses, before two justices; and in default of payment in ten days, the same to be levied by the churchwardens or overseers, by distress and sale, by warrant of such justices. 13 & 14 C. 2. c. 4. s. 7.

Confession.

CONFESSION is twofold, either *expressed*, or *implied*.

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be. 2 Haw. 333.

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 H. H. 225.

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 Haw. 333.

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 Haw. 429.

But such confession must be proved to have been obtained without any promise of favour, menace, or undue terror; for if it is obtained under such impressions, it cannot be received in evidence against the party. 2 H. H. 285.

And the identity of these examinations must be proved at the trial, before they can be read in evidence. Sum. 263.

And if they are not proved, they cannot be admitted orally; for a confession being the strongest proof of guilt, requires the highest authenticity. 2 Haw. 604.

Confession.

And whenever a person's confession is made use of against him, it must all be taken together, and not by parcels, 2 *Haw. c. 6. s. 5.*

All those who on their examination own themselves guilty of a felony alleged against them, and are charged in their *mittimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw. 97.*

Conies. See *Game.*

Conjuration. See *Witchcraft.*

Conspiracy.

I. *What it is.*

II. *How punishable.*

I. *What it is.*

By the common law.

BY the common law there can be no doubt, but that all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw. 190.*

By statute.

2. And conspiracy by statute is as follows: *Conspirators are they that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and such as retain men in the country, with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers: And stewards and bailiffs of great lords, who by their office or power undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.* 33 *Ed. 1. st. 2.*

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord Coke, that not only

only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. *L. Raym.* 1169.

But an *action* will not lie for the conspiracy unless it be put in execution; for in such case, the *damage* is the ground of the action. *Id.* 378.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also: And upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law: But it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only: Also, it hath been resolved, that if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 *Haw.* 192.

One person only cannot be guilty.

In the case of *K. against Kinnersey and Moore, T. 5 G.* An information was brought, setting forth that the defendants being evil disposed persons, in order to extort money from my lord *Sunderland*, did conspire together to charge my lord with endeavouring to commit sodomy with the said *Moore*. The defendant *Kinnersey* only appears, and pleads to issue, and is found guilty. And now exception was taken in arrest of judgment, that to every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty, and the other possibly may be acquitted. But it was answered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict as *Kinnersey* is, yet as the matter now stands *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one, before the trial of the other. And a case was quoted, where several were indicted for a riot, with many others, and two only were found guilty; and it was objected, that there must be three to make a riot; but upon the words, with many others, judgment was given against the defendants.

Judgment may be given against one only.

Conspiracy.

And the court over-ruled the exception. And the defendant had sentence. And in the *Easter* term following, *Moore* also was convicted, and had judgment. *Str.* 193.

Persons acting separately may be guilty of a conspiracy.

In the case of *K.* against *Cope* and others, *H. 5 G.* The husband, and wife, and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card-maker. The evidence against them was, that they had at several times given money to the prosecutor's apprentices, to put grease into the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time was present, tho' it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy; for several persons might do the same thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. *Str.* 144.

And *E. 18 G. 2. K.* against *Eliz. Niccols*. She was indicted for conspiring with *Tho. Bygrave*, unjustly to charge *William Frankland* with a robbery, and for that purpose going before a justice, where *Bygrave* swore it upon him. *Niccols* only came in, and pleaded not guilty. And the jury found that she was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conspiracy, and here is but one convicted. But the court over-ruled this, on the above authority of *Kinnerley's* case, in which case there was a possibility of contradictory verdicts, which here cannot be. *Str.* 1227.

II. How punished.

On action.

It is clear, that those who are convicted of conspiracy at the suit of the party, shall have judgment of fine and imprisonment, and to render the plaintiff his damages. *1 Hew. 193.*

On indictment or information.

Also it is certain, that he who is convicted at the suit of the king, of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled from being put upon any jury, or to be sworn as a witness, or even to appear in person in any of the king's courts), and also that his houses, lands, and

and goods shall be seized into the king's hands, and his houses and lands stripped and wasted, his trees rooted up, and his body imprisoned. And this is commonly called *villainous* judgment, and is given by the common law, and not by any statute, and is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction to such as endangered the life of the party; but this point doth not seem to be any where settled. *Id.*

But this judgment hath been but seldom given; there being no instance of it since the reign of *Edward the third*. *Burr. Mansf.* 996, 1027.

In the case of *Kinnerley* and *Moore* above mentioned, *Kinnerley* was sentenced to be fined 500 l. to suffer a year's imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties in the like manner for seven years. *Str.* 196.

T. 2 G. 3. K. and Rissal. An indictment was found at the session against the defendant and two others, for a conspiracy. The indictment set forth, that the defendants, wickedly and maliciously devising and intending unjustly to vex and aggrieve one *John Chilton*, and to deprive him of his good name, fame, credit, and reputation, wickedly and unlawfully did among themselves conspire, combine, confederate, and agree, falsely and without any reasonable or probable cause, to charge and accuse the said *John Chilton*, that he the said *John Chilton* had then lately taken out of a bag a quantity of human hair of the goods and chattels of the said *Rissal*: That the two other offenders, in pursuance of the said conspiracy, said to *Chilton*, that he was a man of credit, and had better make it up than have his credit blasted: And that *Rissal*, in further pursuance of the said conspiracy, unlawfully and wickedly did extort from the said *Chilton* 30 l. and a promissory note of 33 l. as a composition for the said offence, and to desist from prosecution. On the indictment being removed by certiorari, motion was made in arrest of judgment, upon two objections; First, that the justices at their sessions have no jurisdiction over conspiracies; any more than over perjury, usury, and forgery; it being not specified in their commission, nor given them by any special statute. Secondly, the indictment doth not charge them to have conspired to fix any crime on the defendant, but only taking hair out of a bag, which might be a law-

Conspiracy.

ful act. To the first objection it was answered, That the justices in sessions, under the general words of the commission, have cognizance of all crimes that tend, either directly or consequentially, to a breach of the peace: That conspiracies have this tendency, in the same manner as libels, which are indictable at the sessions, without being specified in the commission; so is extortion also, and this is a conspiracy to extort. To the second objection it was answered, That the charge is, a conspiracy to extort money; by what means is not material: That *Rispol* did actually extort it; which is a direct and positive charge against him. So that either way there is ground sufficient for the court to give judgment against *Rispol*.—By *L. Mansfield* Ch. J. The case lies in a narrow compass. The first question is, Whether the justices in sessions have a jurisdiction over conspiracies. No authority has been cited to shew, that they have not, nor that they have. It must therefore be determined upon general principles. The cases of perjury, forgery, and usury stand upon their own special grounds; and it has been determined, that the justices have no jurisdiction there. This offence of a conspiracy is a trespass; and trespasses are indictable at sessions, tho' not committed with force and arms. They tend to the breach of the peace, as much as cheats or libels, which are established to be within the jurisdiction of the sessions. As therefore there is no authority to the contrary, I think that the justices had a jurisdiction here. The second question is, Whether a sufficient crime be laid in the indictment to enable the court to give judgment. The crime is laid as an unlawful conspiracy. This, whether it be to charge a man with criminal acts, or such only as may affect his reputation, is fully sufficient. The several facts in the indictment are not to be considered as distinct and separate charges; but as one and the same united and continued offence pursued thro' its different stages. And then it is clear, that the whole will amount to an indictable offence, namely, the getting money from a man, by conspiring to charge him with a false fact. *Burr. Mansf. 1320. Black. Rep. 368.*

Constable.

THE office of a constable, in executing of warrants, is treated of under the titles *Arrest* and *Warrant*; and in like manner the other particulars of his duty may be found under the respective titles throughout the book: this title treating only of the office of a constable in general.

- I. Of the antiquity and original of constables.*
- II. Who shall be a constable.*
- III. How chosen and sworn.*
- IV. His power as a conservator of the peace.*
- V. His duty as a subordinate officer to justices of the peace, and punishment for neglect.*
- VI. His indemnity and protection in his office.*
- VII. Concerning the expences of his office.*
- VIII. Concerning his account and removal from his office.*

I. Of the antiquity and original of constables.

The sundry names of high constables, or constables of lathes, rapes, wapentakes, hundreds, and franchises; and the divers names also of petty constables, tythingmen, borstholders, boroheads, headborows, chief pledges, and such other (if there be any) that bear office in towns, parishes, hamlets, tythings, or borows, are all in effect but two, that is to say, *constables* and *borstholders*. Lamb.

Antiquity of
constables in
general.

This word *constable* hath afforded matter of much disquisition to the learned. It is evidently a compound; but from what two original words it hath sprung, hath been variously conjectured. History traceth it from its arrival in *England*, backwards through *France* and *Germany*, and *Greece*, to the imperial seat at *Constantinople* in the days of *Constantine* the Great. From whence we ascend farther still towards the east, where we find the word *cône* or *cûne* in *Palestine*, which signified in the times of the old testament a stability, strength, or stay. Of which word there seem to be some traces in the mongrel name of *Laocoon* at *Troy*; and more especially of this same *Constantine*, who was himself of oriental extraction, having sprung from *Dardania*, a country of the upper *Moësia*, and was said by his flat-

teretq

terers to have been descended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occasion to the adopting of the word into the *Roman* language at that time. For it was then that the word *canst* (the genuine offspring of *cone* or *cune*) first became a name of dignity, and from thence travelled westwards, (with a little variation according to the genius of each language) throughout the provinces. Amongst the *Saxons*, the word was *konig* or *kyninge*, from whence undoubtedly we receive our *English* word *king*. Again, the word *stole*, *stall*, *stafle*, *stable*, by an easy transmutation of those letters frequent in almost all languages (and which seemeth the other constituent of the word *constable*), is likewise common to those languages of the middle ages, and signifieth a standing place, division, or department, called by the *Romans* *statio*; and all of them probably from the same origin with the Latin *sto*; and the ancient *Greek* word *stao*: So that, according to this etymology, the word *constable* will properly signify the stability or stay of the place, or the strong man of the division. The *German* word is *conestabbe*; the French *conestable*, the Italian *constabile*; the Spanish *condestable*, from the word *conde* which they use for *count*. All which seem to be comprehended in the imperial denominations of the *Constantine* family, such as *Constant*, *Constantius*, *Constantinus*, *Constantia*, *Constantina*, *Constantianus*, *Constantinicus*, and the like.

As touching *borsholders* (which is the other general name, and doth contain within it the meaning of tythingmen, borobeads, headborows, thirdborows, and chief pledges;) that is made up of the Saxon *birge*, *barrow*, or *brhoe*, a pledge, and *ealder*, the elder, chief, or head; and *borsh-ealder* in one word doth mean the chief or head of the sureties or pledges. For the understanding whereof, it is to be remembered, that by the ancient laws of this realm (before the coming in of King *William* the conqueror) it was ordained for the more sure keeping of the peace, and for the better repressing of thieves and robbers, that all freeborn men should rift themselves into several companies, by ten in each company; and that every of those ten men of the company should be surety and pledge for the forthcoming of his fellows; so that if any harm were done by any of these ten, against the peace, then the rest of the ten should be amerced, if he of their company that did the harm should sit, and were not forthcoming to answer to that wherewith he should be charged. And for this cause, the companies are yet in some places of

of England called *boroes*, of the said word *berge*, *borrow*, or *boroe*, signifying a pledge or surety; and in other places they are called *tythings*, because they contain (as hath been said) the number of ten men with their families. And even as ten times ten do make an hundred, so because it was then also appointed that ten of these companies should at certain times meet together for their matters of greater weight, therefore that general assembly, or court, was and yet is called a *hundred*. Furthermore, it was then also ordained, that if any man were of so evil credit, that he could not get himself to be received into one of these tythings or boroes, then he should be shut up in prison, as a man unworthy to live at liberty amongst men abroad. Now whereas every of these tythings or boroes did use to make choice of one man amongst themselves, to speak and to do in the name of them all; he was therefore in some places called the tythingman, in other places the boroes elder, (whom we now call *borougher*), in other places the boroehead or headborow, and in some other places the chief pledge, which last name doth plainly expound the other three that are next before it; for head or elder of the boroes, and chief of the pledges are all one; and in some shires, where every third borough hath a constable, there the officers of the other two are called *thirdborows*. And in these tythings or boroes, sundry good orders were observed; and amongst others, first, that every man of the age of 21 years should be sworn to the king: Then, that no man shall be suffered to dwell in any town or place, unless he were also received into some such suretyship and pledge as is aforesaid: Thirdly, that if any of these pledges were imprisoned for his offence, then he ought not to be delivered without the assent of the rest of his pledges: Again, that no man might remove out of one tything or boroe, to dwell in another, without lawful warrant in that behalf: Lastly, that every of these pledges should yearly be presented and brought forth by their chief pledge, at a general assembly for that purpose, which we yet in remembrance thereof do call the *view of frankpledge*, or the *leet court*. *Lamb. Const.*

Some small shadow of which antiquity we seem still to retain in a common phrase in drinking, when a man says to another that he will *pledge* him; which is said to have begun when the *Danes* tyrannized in this land; and the meaning was to encourage the person to drink freely, for that the other would be surety to him that no one should do him any bodily harm whilst he was drinking.

Also

Also we do still retain the word *borrow* as a verb in our language, signifying to take money upon a pledge or surety.

In some places, at this day, there is both a tythingman and constable, where the tythingman is as it were a deputy to execute the office in the constable's absence: but there are some things which a constable hath power to do, that tythingmen cannot intermeddle with; for the constable may do whatever the tythingman may do, but not on the contrary, the tythingman not having an equal power with the constable. But in places where there is no constable, the office and authority of tythingman seems to be all one under a different name. 1 *Black.* 357.

Antiquity of
high constables.

By the statute of *Winchester*, In every hundred and franchise two constables shall be chosen to make the view of armour; and they shall present defaults of armour, and of suits of towns, and of highways, and such as lodge strangers in uplandish towns, for whom they will not answer. 13 Ed. 1. st. 2. c. 6.

And from hence *L. Coke*, and others, will have it, that high constables are no ancients than this statute: But *Mr. Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities) says, that it seems to be the better opinion, that both constables of hundreds, which are commonly called high constables, and also constables of tythings, which are at this day commonly called petty constables or tythingmen, were by the common law, and not first ordained by the said statute of *Winchester*; for that statute doth not say, that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. 2 *Haw.* 61.

Their duty.

In short, the truth of the matter seems to be this: The far greatest part of the business of high constables, at this day, is not at all appropriated to them as high constables; but only as officers to execute the precepts of the justices of the peace, which any other person may do as well as they. The original and proper authority of an high constable, as such, seems to be the very same and no other, within his hundred, as that of the petty constable within his vill; and therein, most probably, he is coeval with the petty constable. The other usual branches of his office, such as the surveying of bridges, the issuing precepts concerning the appointing of overseers of the poor, surveyors of the highways, assessors, and collectors of the land tax and window duties, and in like manner the viewing of armour by the above mentioned statute, are in him, not

not of necessity, but as matter of convenience, and it is discretionary in the justices whom they will appoint to be their officers in these cases; others have been superadded to their office, for the like reason of convenience, by sundry acts of parliament, such as the issuing precepts for the licensing of alehouses, for levying county rates, and for returning lists of jurors; for that one person can do all the same much easier and cheaper than so many different persons.

II, Who shall be a constable.

No person is qualified to be a constable who is not an inhabitant of the place for which he is to serve. *Field. Pen. Stat. 331.* To be an inhabitant.

And every inhabitant may not be a fit person to be appointed to this office, for he ought to be of the abler sort of parishioners: and if a very ignorant or poor person be chosen, he may by law be discharged, and an abler person appointed in his room. *Dalt. c. 28.* And able person.

It hath been said, that a custom in a town, that the inhabitants shall serve the office of constable by turns, according to the situation of their several houses, is not good; for that, by such a course, it may come to a woman's turn to be a constable, as inhabitant of one of those houses; yet we find such customs allowed to be good in later books; and it seems, that the consequence of the reasoning above mentioned may well be denied, since a woman in such case may procure another to serve for her. *2 Haw. 63.* Women;

Also it seems, that a practising physician, being chosen constable in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private. *Id.* Physicians;

But in the *K. and Clarke, E. 27 G. 3.* it was held that the king may exempt any person, or whole bodies corporate, from serving the office of constable, subject however to this restriction, that the exemption be not extended so far as to prevent the existence of the office in any particular place. *1 Durnf. and East, 682.*

But by the *32 H. 8. c. 40.* The president, commons, and fellows of the faculty of physick in London, shall not be chosen constables.

And by the *5 H. 8. c. 6.* and *18 G. 2. c. 15.* Surgeons in London shall be freed and exempted from the office of constable. Surgeons;

In

In the case of *K. and Pond, M. 5 G.* On an indictment against *Pond*, a surgeon, for refusing to be constable, it was moved to the attorney general that a *noli prosequi* might be granted, for that by the 5 *H. 8. c. 6.* (and by the 32 *H. 8. c. 40.* for the incorporating of barbers and surgeons, which incorporation was dissolved by the above act of 18 *G. 2.*) all persons of the corporation of surgeons within *London* are exempt; and though it had been held that physicians are not exempt, yet by the equity of those statutes, and by the custom of the realm, all surgeons have been allowed the same privilege: and therefore a *noli prosequi* was allowed, unless cause shewn. And no cause was shewed, the reporter says, that ever he heard of. *Comyns, 312.*

Apothecaries.

By the 6 & 7 *W. c. 4.* Apothecaries in *London*, and within seven miles thereof, being free of the company of apothecaries; and also those in the country who have served seven years apprenticeship, shall be exempted from the office of constable.

Attornies.

Also it seems certain, that if a sworn attorney, or other officer, of the courts at *Westminster*, be chosen into this office, he may have a writ of privilege for his discharge, by reason of his necessary attendance in those courts: and it hath been resolved, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom, in respect of their estates, or otherwise; for that no such custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them. 2 *Haw. 63.*

Barristers at law, servants to members of parliament.

And upon the like reasons, it is taken for granted, that practising barristers at law, and the servants of members of parliament, have the same privilege, but there seem to have been no resolutions to this purpose. *Id.*

Aldermen of London.

Also it hath been resolved, that an alderman of *London*, for the like reasons, is not compellable to be a constable. *Id.*

Captains of the guards.

But it hath been holden, that a captain of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he is bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom. *Id.*

But

But no serjeant, corporal, nor private man, serving in the militia, shall, during the time of such service, be liable to serve the office of constable. 26 G. 3. c. 107. s. 130. Militia man.

By the 1 W. c. 18. s. 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, shall from the time of his subscription and taking the oaths, be exempted from the office of constable. Dissenting teachers.

Yet if such an officer as before mentioned, or a gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which hath sufficient persons besides to execute this office, and no special custom concerning it; perhaps he may be relieved by the king's bench; but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them, to execute it. But these points seem not to be settled. 2 Haw. 63. Where there are others sufficient.

And by 10 & 11 W. c. 23. s. 2, 3. The prosecutor of a felon to conviction, or person to whom he shall assign the certificate thereof, shall be discharged from the office of constable. Prosecutors of felons.

Inasmuch as the office of a constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy, without some special cause, 2 Haw. 62. Whether he may appoint a deputy.

In the case of *Medhurst and Waite*, M. 2 G. 3. The high constable appointed a deputy to billet soldiers under the mutiny act: This appointment was by parol only, and the deputy was not sworn. By L. *Mansfield* and the court: The high constable had power by the act to billet soldiers; and he may appoint a deputy to this particular ministerial act. This is a ministerial (not a judicial) act: And a constable may appoint a deputy to do ministerial acts. *Burr. Mansf.* 1259.

And in the case of *K. v. Clarke*, E. 27 G. 3. it seemed to be admitted as a settled point, that a constable may appoint a deputy. *Durnf. and East*, 1 V. 682.

And the superior must be answerable for his deputy, upon any miscarriage; unless the deputy is duly allowed and sworn; for then he is constable. *Word*, b. 1. c. 7.

And by 1 W. c. 18. s. 7. If any person dissenting from the church of England, shall be sworn constable, Dissenters appointing a deputy.
and

Constable.

and shall scruple to take upon him the office, in regard of the oaths, or any other matter required to be done in respect of such office; he may execute it by a sufficient deputy by him to be provided, to be allowed by such persons, and in such manner, as such officer should have been allowed.

And by 31 G. 3. c. 32. the like privileges are given to Roman catholicks on their taking and subscribing the oath and declaration therein specified. *f. 7.*

III. How chosen and sworn.

By whom to be chosen.

It seemeth, regularly, that the petty constable ought to be chosen in the leet; and the high constable (properly so called) in the torn, which is the general leet of the whole hundred; and if there be no leet, then that the petty constable ought to be chosen also in the torn.

But whether they are to be chosen and appointed by the suitors in the respective courts, or by the lord or his steward in the leet, and the sheriff in his torn, seemeth not clearly determined. *2 Haw. 62.*

By whom to be sworn.

But by which of them soever they shall be chosen and appointed, it seemeth clear, that they are to be sworn and placed in their office, by the lord or his steward, or by the sheriff respectively, as being judge of the court.

Custom of choosing.

Also it seems certain, that a custom for choosing a constable either way, is good; and it seems to have been the opinion of the makers of the act of 13 & 14 C. 2. hereafter following, that the lords of the courts leet have this power of common right, and consequently the sheriff in his torn, where there is no court leet. *2 Haw. 93.*

Anciently the practice was, that in every hundred where there was a feudal lord, the constables were sworn in and admitted by the lord or his steward in his leet; but where there was no such feudal lord, the sheriff in his torn had the swearing and placing of them in: also if there was no feudal lord of the hundred, an annual officer was chosen, who was to preside over the whole hundred, who was called the high constable; but if the hundred was feudal, as it often anciently was, then such lord of the hundred administered the office himself. *1 Bac. Abr. Const. A.*

Choosing high constables.

But now the usual manner is, that the high constables of hundreds be chosen either at the sessions, or by the greater number of the justices of the division; and likewise

likewise that they be sworn at sessions, or by warrant from the sessions; which course hath been often allowed and commended by the justices of assize. *Dalt. c. 28.*

And the reason thereof may be this, as hath been intimated above; namely, that their office at present doth not so much consist in executing the office of high constable as such, as in executing the justices precepts, which they may do for the most part, whether they be indeed high constables or not.

And moreover, every petty constable, being a principal peace officer, and it being necessary for the preservation of the peace, that every vill should be furnished with one; the justices of the peace have ever since the institution of their office, taken upon them as conservators of the peace, not only to swear the petty constables, which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts; or to take care that such officers are appointed in them. And this power of justices of the peace having been confirmed by the uninterrupted usage of many ages, shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the justices at their sessions, to swear one who was chosen at the leet, and unduly rejected by the steward, who had sworn another in his place. 2 *Haw. 65.*

Petty constables appointed by justices of the peace.

And in the case of *K. and Dr. Franchard, H. 14 C. 2.* *Dr. Franchard* was chosen constable of *Milborne Port* at the leet, which immediately adjourned; and he was afterwards sworn in by a single justice of the peace: And upon motion for an information as not being duly sworn, the court held this to be a good swearing. *Sir. 1149.*

M. 21 C. 2. The justices of the county of *Northampton*, at their general sessions chose a constable for *Helmby*; and for not coming in to take the oath, proceeded against him. Which proceedings being removed by certiorari into the king's bench, it was moved on affidavits that there had not been a constable there for 50 years before, that he might be discharged; alleging likewise, that *Helmby* was a privileged place, and that all the inhabitants were the duke of *York's* tenants: But the court held, that they could not discharge him on motion, and said, that they must determine the matter by action of false imprisonment, or some other way; and inclined strongly that he could not any way be discharged: For, by the court,

Where no appearance hath been before.

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oath that he is afraid of death, because he is not a judge of record; which is the reason that an obligation taken by him shall be in his own name, and not in the king's name, and the same shall be certified in the sessions of the peace. *Cro. Eliz.* 375, 376.

V. His duty as a subordinate officer to justices of the peace, and punishment for neglect.

Subordinate to the justices of the peace.

It hath always been holden, that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. *2 How.* 262.

Punishment for neglect of duty.

By 33 G. 3. c. 55. Two justices at any special or petty sessions, upon complaint upon oath, of any neglect of duty, or disobedience of any lawful warrant or order of any justice, by any constable, or other peace or parish officer, (such person having been duly summoned to appear and answer such charge,) may impose, upon conviction, any reasonable fine not exceeding 40 s.; upon such constable, or other peace or parish officer, as a punishment for such disobedience or neglect of duty; and if not paid, may by their warrant levy the same by distress and sale of the goods of such offender, rendering to him the overplus (if any) after deducting such fine; and the charges of such distress and sale, to be applied to the poor of the parish or place where such offender shall reside, at the discretion of such justices. And for want of such distress, such offender shall be committed to the house of correction for any time not exceeding ten days. *f. 1.*

Appeal.

If any person shall think himself aggrieved by any thing done in the execution of this act, he may appeal to the next sessions of the county or place where he shall reside, upon giving ten days notice thereof. *Id.*

And no person acting under any such warrant of distress, shall be deemed a trespasser *ab initio* by reason of any irregularity in such warrant or proceedings thereupon. *Id. f. 2.*

Executing a warrant out of his district.

Blatch v. Kemp. *Maidstone* summer assizes, 1782. This was an action of trespass for entering the plaintiff's house. The defendant had acted under a warrant from a justice

justice to search for nets; the warrant on being produced was directed "To the constable of Shipborne; to Samuel Carter, and to all other officers of the peace in the county of Kent." Evidence was given that the defendant was boroughholder of the hundred of Little Peckham, which adjoined to the hundred of Shipborne in which the plaintiff's house was situated.—Peckham for the defendant contended, that he was constable for the county, and came within the warrant, which was directed to all officers of the peace in the county of Kent.—Erskine and G. Bond, *contra*, argued, that when a justice directed a warrant generally to a constable of a given district, and all other peace officers within the county, it was *reddendo singula singulis* to the constable of each district in the county according as the warrant might require execution in any part of the county. But no justice could by such a warrant authorize a constable of one hundred to act in another without specially appointing him so to do. This was a wife and politic regulation, for if the execution of warrants were given to mere strangers, force would often be repelled by force, and infinite mischief would attend the departure from the antient rules of local magistracy. If the defendant, not being constable of Shipborne, had been required to execute the warrant and had refused, he could not have been punished for his refusal. He was only a volunteer, neither generally described in the warrant nor specially named, and was not entitled to notice under the statute.—L. Mansfield. This is a most unjust action, the plaintiff having received no sort of damage, and defendant having acted *bonâ fide*. I therefore wished much to get rid of it. But the law is correctly brought to my recollection, and I am sorry to find it with the plaintiff. No constable can act under a warrant out of his district; it is certainly to be taken, *reddendo singula singulis*. I remember a famous case at *Norwich*, where it was so determined. The reasons given by the counsel for the plaintiff are good ones; they weighed with me in the *Norwich* case. This warrant is directed "To the constable of Shipborne; to Samuel Carter, and to all other peace officers;" the defendant is neither constable of Shipborne, nor Samuel Carter, and the general direction is to be taken to each within his district. Therefore as the warrant was not directed to the defendant he cannot justify under it, and plaintiff must have a verdict for 1s. *Caf. by H. Black. 1 V. 15. [N.]*

*VI. His indemnity and protection in his office.***Double costs.**

If an action is brought against a constable for any thing done by virtue of his office; he, and also all others which in his aid, or by his command, shall do a thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers, he shall have double costs. 7 J. c. 5.

Proper county.

And such action shall be laid in the county where the fact was committed, and not elsewhere. 21 J. c. 12.

No action if he delivers a copy of the warrant.

Formerly the constable was bound to take notice of the jurisdiction of the justice: inasmuch that if the justice issued a warrant in any matter wherein he had no jurisdiction, the constable was punishable for the execution of it: but now, by the statute of 24 G. 2. c. 44. it is enacted, that no action shall be brought against any constable, or other person acting by his order, and in his aid, for any thing done in obedience to the warrant of a justice of the peace, until demand hath been made, or left at the usual place of his abode, by the party, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand: and if, after compliance therewith, any such action shall be brought, without making the justice who signed such warrant defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the justice. And if such action be brought jointly against the justice and constable; on proof of such warrant, the jury shall find for the constable, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict be given against the justice, the plaintiff shall recover his costs against him, to be taxed in such manner by the proper officer, as to include such costs as the plaintiff is liable to pay to such defendant, for whom such verdict shall be found as aforesaid. f. 6.

Note; By this it seemeth that the constable ought not to return the warrant to the justice, but to keep it for his own justification; for he cannot grant to the party the perusal of the warrant, unless he hath it: but he must certify to the justice what he hath done in the execution thereof.

No action but within six months.

And no action shall be brought against any constable, but within six months after the act committed. 24 G. 2. c. 44. f. 8.

And

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And if the constable is assaulted in the execution of his office, he need not go back to the wall, as private persons ought to do: and if in the striving together, the constable kills the assailant, it is no felony; but if the constable is killed, it shall be construed premeditated murder. *Hale's Pl. 37. 1 H. H. 457.*

Constable assaulted need not go back to the wall

VII. Concerning the expences of his office.

By the 27 G. 2. c. 20. The constable executing a justice's warrant, for levying a penalty or other sum of money directed by an act of parliament, by distress, may deduct his own reasonable charges of taking, keeping, and selling the goods distrained; returning the overplus on demand, after such penalty or sum of money and charges deducted.

Charges of making distress.

A person committed to gaol, for any misdemeanor, shall bear his own charges (if able) for conveying or sending him to the said gaol, and the charges of those that guard him thither; and if he shall refuse at the time of commitment to defray the same, or shall not then pay the same, the justice committing him shall, by warrant to the high or petty constable where the person shall inhabit, or from whence he shall be committed, or where he shall have any goods within the county, order so much to be sold thereof, as by his discretion shall satisfy the same; the appraisement to be made by four honest inhabitants. 3 J. c. 10. s. 1.

Charges of conveying an offender to gaol.

And if he have not money nor goods within the county, sufficient to bear the charges of himself and of those who convey him to the gaol or house of correction, the constable may make application to a justice, who may upon oath examine into and ascertain the reasonable expences, and shall by his warrant (without fee) order the treasurer to pay the same; except in *Middlesex*, where the same shall be paid by the overseers of the parish where the person was apprehended. 27 G. 2. c. 3.

And by the 18 G. 3. c. 19. Whereas constables, headboroughs, and tithingmen, are or may be at great charge in doing the business of their parish, township, or place, and in many cases are not sufficiently indemnified by law; it is therefore enacted, that every constable or other such officer shall every three months, and within 14 days after he shall go out of his office, deliver to the overseers a just account in writing, fairly entered in a book to be kept for that purpose, and signed by him, of all sums so by him

Charges in the business of the parish.

H b 4

expended

expended on account of the said parish, township, or place, in all cases not hitherto provided for by law, and also of all sums received by him on the account of the said parish, township, or place; and the overseers shall, within the next 14 days after the account shall be so delivered, lay the same before the inhabitants, and if approved by the majority of them, the overseers shall pay out of the poor rate such sum as shall appear to be due on the said account: But if the account, or any part thereof, shall be disallowed, the overseers shall deliver back to the constable or other officer such book of accounts, who may then produce the said book to a justice, giving reasonable notice thereof to the overseers, which justice shall examine the same, and hear and determine any objection that shall be made to the account; and settle the sum which shall appear to him to be due, and enter the same in the account, and sign his name thereto; and the overseers shall pay the same accordingly.

Provided, that if the overseer shall find that the parish, township, or place is aggrieved by any thing done or omitted by the said constable or other officer, or by the justice, or shall have any material objection to the account, or to such determination as aforesaid; he may, giving reasonable notice to the said justice, constable, or other officer, appeal to the next general or quarter sessions for the county or liberty where such parish, township, or place lies; who shall hear and finally determine the same: But if it shall appear to the justices that reasonable notice was not given, they shall adjourn the appeal to the next quarter sessions. And the justices may order to the party for whom the appeal shall be determined reasonable costs, in like manner as concerning settlements by the 8 & 9 W. c. 30.—Provided, that in corporations which have not four justices, the overseer may appeal, if he thinks fit, to the sessions of the county. *f. 5, 6.*

Sessions may
make regula-
tions.

And the justices in sessions may from time to time lay down or alter such rules and regulations as to any costs or charges to be allowed to any person by virtue of this act, as to them shall seem just: which rules and regulations, having received the approbation and signature of one or more of the judges of assize, shall be binding, and not otherwise, on all persons whatsoever. *f. 9.*

VIII. Concerning his account and removal from his office.

The high constables shall at the general or quarter sessions, if thereunto required, account for the general county rate by them received; on pain of being committed to gaol until they shall account; and shall pay over the money in their hands, according to the order of the said court, on the like pain: And all their accounts and vouchers shall, after having been passed at the said sessions, be deposited with the clerk of the peace, to be kept amongst the records, and inspected by any justice without fee. 12 G. 2. c. 29. s. 8.

High constables
to account at
the sessions.

And in such manner as constables are to be chosen, in the same manner, and by the like authority, are they to be removed; so as if there shall be cause to remove and put an high constable from his place, it hath not been thought fit, that any one or two justices should do it upon their discretion, but that it should be done by the greater part of the justices of that division, and that for some just cause; or else that it be done at the sessions. *Dalb. c. 28.*

Removal.

And it seems clear, that the sheriff or steward of the leet, having power to place a constable in his office, have by consequence a power of removing him. 2 *Haw. 63.*

And also the justices of the peace have also used, for good cause, to displace all such constables as have been chosen and sworn by them. 2 *Haw. 65.*

And by the 13 & 14 C. 2. c. 12. If a constable shall continue above a year in his office, the sessions may discharge him, and put another in his place, till the lord shall hold a leet. s. 15.

Constable con-
tinuing above a
year.

And if the court, or other judge, shall refuse to discharge a constable, the king's bench may compel them by *mandamus*. 2 *Haw. 65.*

A. Indictment for not taking the office.

THE jurors for our lord the king upon their oath present, that A. O. late of _____ in the township of _____ in the said county, yeoman, on the _____ day of _____ in the _____ year of the reign of _____ and long before, and always after until the day of the preferring of this indictment, was and is an inhabitant and residing within the township of _____ aforesaid in the county aforesaid, and an able person to serve the office of constable for the said township; and

Constable.

and he the said A. O. on the said — day of — in the year aforesaid, in the township aforesaid, at the court leet of A. L. lord of the manor of — aforesaid, bidden before A. S. gentleman, steward of the said court, by the suitors of the said court, was elected and chosen, according to the ancient custom of chusing constables for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable: [or otherwise as the custom shall be for chusing constables:] And that the said A. O. afterwards, to wit, on the — day of — in the year aforesaid, at the township of — aforesaid, had due notice given to him by A. B. bailiff of the aforesaid manor, of his being so elected and chosen constable as aforesaid, and then and there was by him the said A. B. required to appear before J. P. esquire, then and yet one of his majesty's justices assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county, on the said — day of — in the year aforesaid, to take his oath for the due executing the said office of constable for the same township, according to the duty of that office: notwithstanding the said A. O. his duty in that behalf was regarding; but contriving and intending wholly to neglect to serve the said office of constable, after he the said A. O. was so elected and chosen into the said office as aforesaid, to wit, on the said — day of — in the year aforesaid, and continually afterwards until the day of taking this inquisition, at the township aforesaid, in the county aforesaid, unlawfully and contemptuously did refuse, and still doth refuse, to take his said oath for the due executing the said office of constable, and in any wise to execute the same office, to the great hindrance of justice, in contempt of our said lord the king, and to the evil example of all others in the like case offending, and against the peace of our said lord the king.

B. Constable's oath.

YOU shall well and truly serve our sovereign lord the king, [and the lord of this leet, if sworn in a court leet,] in the office of constable, for the township of — for the year ensuing, according to the best of your skill and knowledge: So help you God.

Contempt. See Attachment.

Conviction.

THE power of a justice of the peace to convict an offender in a summary way without a trial by jury, is in restraint of the common law, and in abundance of instances a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of this branch of the office of a justice of the peace; but the intendment will be against it. Therefore where this special power is given to a justice of the peace by act of parliament, it must appear that he hath strictly pursued it; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

The difficulty of drawing up a conviction in due form, hath induced the legislature to institute a more apt and compendious method in divers instances; and it were to be wished, in ease of the justices, that this provision might be made more general. These summary forms of convictions, which are specially directed by act of parliament, are interspersed throughout this book under the titles to which they do respectively belong.

Other forms of convictions, which are left at large according to the course of the common law (having no prescriptive

Conviction.

scriptive form of words directed by any act of parliament) are likewise drawn forth at length under divers titles; particularly concerning such matters as have been often controverted in the courts above, occasioned either by the largeness of the penalties, or sometimes by the greatness of the offenders; as in cases of *riots, forcible entry, game destroying, weights and measures*, and such like, and to them the reader is referred.

It remaineth, under this title, to insert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

County of } **B**E it remembered, that on the — day of —
 — in the — year of the reign of our sovereign
 lord George the third, by the grace of God king of Great Bri-
 tain, and so forth, and in the year of our Lord —, at —
 in the county of —, A. I. of — in the county of —
 yeoman, (if the penalty is appropriated as well to his majesty,
 as to the informer, say, *who prosecutes as well for his said
 majesty as for himself in this behalf*, if as well to the poor of
 the parish where the offence was committed as to the in-
 former, say, *who prosecutes as well for the poor of the parish
 of — in the county of — as for himself in this be-
 half*,) in his proper person cometh before me, J. P. esquire, being
 one (or, if the proceedings are required to be before two
 justices, say, *before us, J. P. esquire, and J. P. esquire, being
 two*) of the justices of our said lord the king, assigned to keep the
 peace of our said lord the king in and for the said county of
 —, and also to hear and determine divers felonies, tres-
 passes and other misdemeanours in the said county committed, (if
 the particular statute require the conviction to be made by
 a justice or justices residing near the place where the of-
 fence was committed, say, *residing near the place where the
 offence hereinafter mentioned was committed*,) and (as well for
 — as for himself, if the case so requires, and if the in-
 formation is required to be on oath say, *or his corporal oath*)
 giveth me (or us) the said justice (or justices) to understand and
 be informed, that within — now last past, that is to say,
 on the — day of — in the year of our Lord —, at
 — in the said county of —, one A. O. of —
 in the county of — yeoman, (here insert the informa-
 tion,) against the form of the statute (or statutes) in such case
 made and provided, whereby, and by force of the said statute (or
 statutes),

Information.

statutes), the said A. O. hath forfeited for his said offences the sum of — of lawful money of Great Britain, and thereupon the said A. I. humbly prays the judgment of me (or us) the said justice (or justices) in the premises, according to the form of the statute (or statutes) in such case made and provided, and that the said A. O. may be summoned to answer the said premises, and to make his defence thereto before me (or us) the said justice (or justices). [If the offender hath been summoned and doth not appear, say, *Whereupon, on the said — day of — in the year aforesaid, at — aforesaid in the said county of —, I (or we) the said justice (or justices) do issue my (or our) summons under my (or our) hand (or hands), directed to the said A. O. thereby notifying to him the said information and complaint, requiring the said A. O. to be and appear before me (or us) on the — day of — next, at — of the clock in the forenoon of the same day, at — in the said county of —, to answer and make his defence in and to the matters contained in the said information; and I (or we) do authorize and require — to serve this my (or our) summons, and to attend me (or us) at the time and place before mentioned, then and there to make a return to me (or us) of the execution of my (or our) said summons; (if the summons is not directed to the party but to some third person, then instead of the above form, say, whereupon, on the said — day of — in the year aforesaid, at — aforesaid in the said county of —, I (or we) the said justice (or justices) do issue my (or our) summons, under my (or our) hand (or hands), directed to —, (as the case may be,) thereby notifying the said information and complaint, and requiring the said — forthwith to summon the said A. O. to be and appear before me (or us) the said justice (or justices) on the — day of — next, at — of the clock in the forenoon of the same day, at — in the said county of —, to answer and make his defence in and to the matters contained in the said information; and I (or we) do require the said — to attend me (or us) at the time and place before mentioned, then and there to make a return to me (or us) of the execution of my (or our) said summons: then proceed in both cases as follows); at which time and place, that is to say, at — in the said county of —, on the said — day of — at — of the clock in the forenoon of the same day, before me (or us) the justice (or justices) aforesaid, comes the said A. I. and the said A. O. alibi solemnly called, neglects to appear before me (or us), and doth not appear before me (or us), nor make any defence against the said charge as aforesaid, although I (or we) have waited to the extreme part of the forenoon of the same day for the appearance of the said A. O., and*

Issuing of summons.

Non-appearance.

Proof of service
of summons.

Appearance.

Confession be-
fore evidence.

Plea;

and ———, a credible witness in this behalf, cometh before me (or us) the said justice (or justices) in his proper person, and before me (or us) the said justice (or justices) the said ——— being then and there, to wit, on the same day and year last aforesaid, at ——— aforesaid in the said county of ———, duly sworn touching the premises, upon the holy gospel of God, on his corporal oath to him then and there administered by me (or us) the said justice (or justices), (I (or we) the said justice (or justices) having then and there full power and authority to administer the said oath to the said ———,) deposeth, sweareth, and on his oath aforesaid affirmeth and saith, that he the said ——— did, on the ——— day of ——— last past, at ———, duly serve the said A. O. with the said summons, by and then there delivering a true copy thereof to the said A. O. and shewing him the said original summons, (or, if the original was delivered to the party, say, by them and there delivering the same personally to the said A. O.) therefore I (or we) the said justice (or justices) do proceed to examine into the truth of the said information and complaint; if the offender appears, then immediately after the information, and instead of the above, say,] Whereupon the said A. O. having been duly summoned in this behalf, to answer and make his defence to the said information, and to the said offence therein charged upon him, before me (or us) the said justice (or justices), afterwards, that is to say, upon the ——— day of ——— in the year aforesaid, at ——— aforesaid in the said county of ———, appeareth and is present before me (or us) the said justice (or justices), in order to answer and make good his defence to the said information, and the said offence therein charged upon him as aforesaid; and he the said A. O. having heard the same, is asked by me (or us) the said justice (or justices), if he can say any thing for himself, why he the said A. O. should not be convicted of the premises above charged upon him in form aforesaid; [if the offender confesses the fact, say, and thereupon the said A. O. freely and voluntarily confesseth the said information, and the said offence and all and singular the matters and things therein contained to be true, and doth not shew any cause before me (or us) the said justice (or justices) why he should not be convicted of the said offence charged in the said information, and then go immediately to the judgment; if the offender pleads not guilty, then instead of such confession, say], who pleadeth that he is not guilty of the said offence. Nevertheless on the said ——— day of ——— in the year aforesaid, at ——— aforesaid in the said county of ———, one credible witness, to wit, A. W. of ——— in the county of ——— yeoman,

— yeoman, cometh before me (or us) the said justice (or justices) in his proper person, and before me (or us) the said justice (or justices) the said A. W. being then and there, to wit, on the day and year last aforesaid, at — aforesaid in the said county of —, duly sworn touching the premises upon the holy gospel of God, on his corporal oath to him then and there administered by me (or us) the said justice (or justices), (I (or we) the said justice (or justices) having then and there full power and authority to administer the said oath to the said A. W.) deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, in the presence and hearing of the said A. O. that, (here set forth the matters of fact which are the subject of the information, and if the witness is cross examined, say, and the said A. W. being cross examined by the said A. O. on his oath aforesaid saith, that, here set forth such cross examination, and if more than one witness is examined, state the swearing and examination of every witness thus, and also on the said — day of —, in the year aforesaid, at — aforesaid in the said county of —, one other credible witness, to wit, B. W. of — in the county of — yeoman, and proceed as in the swearing and examination of the last witness.) Whereupon, all and singular the matters and things in the said information and evidence contained being by the said A. O. then heard and fully understood, the said A. O. is by me (or us) the said justice (or justices) asked, what he hath to say or offer in his defence against the said information and offence, and in answer to the evidence given as above mentioned, and what he hath to say why he should not be convicted of the premises so charged upon him; [if the offender alleges a defence, say, and thereupon the said A. O. in his defence saith, that, stating his defence, and if not proved, say, but does not produce any evidence to prove the same, nor doth he require any time for that purpose; if the offender makes no defence, say, but the said A. O. doth not offer or say any thing, or produce any evidence, in his defence against the said information and offence, and in answer to the evidence given as above mentioned, nor why he should not be convicted of the premises so charged upon him; if the offender makes any defence by a witness or witnesses which does not entitle him to an acquittal, then, omitting to state such defence, say,] and so far as upon hearing and fully understanding the said information, and the evidence given as above mentioned, and also upon hearing and fully understanding all and singular the matters and things by the said A. O. alleged and proved in his defence touching the premises in the said in-

Evidence.

Defence.

Confession after
evidence.

Judgment.

Information specified, [and, omitting what follows from this place, proceed as at the X page. So, if the offender confesses the offence in this stage of the proceedings, say, and whereupon the said A. O. confesseth the said information, and the said offence and all and singular the matters and things therein contained, to be true, and doth not shew any cause before me (or us) the said justice (or justices) why he should not be convicted of the said offence charged in the said information. Whereupon all and singular the premises being seen and fully understood by me (or us) the said justice, (or justices), and mature deliberation being thereupon had], X it manifestly appears to me (or us) the said justice (or justices), that the said A. O. is guilty of the premises above charged upon him in the said information; it is therefore adjudged by me (or us) the said justice (or justices), upon due proof thereof made to my (or our) satisfaction, (or, if the offence was confessed in the first instance, say, upon the free and voluntary confession of the said A. O.) that all and singular the matters and things in the said information contained are true; and thereupon, I (or we) the said justice (or justices), on the said — day of — in the year aforesaid, at — aforesaid in the said county of —, do convict the said A. O. of the offence aforesaid in and by the said information charged against him, and he the said A. O. is hereby convicted thereof by me (or us) the said justice (or justices), upon the oath of one (or —) credible witness (or witnesses), (or upon his own free and voluntary confession,) according to the form of the statute (or statutes) in such case made and provided; and I (or we) the said justice (or justices) do adjudge, that the said A. O. for his offence aforesaid, hath forfeited the sum of — of lawful money of Great Britain, (as in the information; and if the penalty is mitigated, say, which said sum of — I (or we) do mitigate to the sum of —.) to be distributed as the law directs; (or and I (or we) do adjudge that one half of the said sum of — be paid to the said informer A. I. and the other half of the said sum of — be paid to the poor of the parish of — aforesaid, where the said offence was committed, (or as the case requires,) according to the form of the statute (or statutes) in such case made and provided; (and if costs are given say, and I (or we) do further adjudge, that the said A. O. do forthwith pay to the said A. I. the sum of — of like lawful money for his costs in and about the premises.) In witness whereof, I (or we) the said justice (or justices) to this record of conviction have put my (or our) hand and seal (or hands and seals), at — aforesaid in the said county of —, the said

Said — day of — in the — year of the reign of our said sovereign lord the now king, and in the stat. of our Lord —

Be it remembered] A conviction is the prosecution of the party, and a memorandum of what the justice hath done in the matter. *Salk.* 378. Conviction, what.

On the — day of —] The information should contain the day when it was taken, that it may appear to have been given within the time limited by the statute. *L. Raym.* 582.

At — in the county of —] The place where the information was taken is material to be shewn, that it may appear the justice was acting within the limits of his jurisdiction; and it seems proper to name the county in the body of the conviction. In *K. v. Aulin*, 8 *Mod.* 309. an order was quashed, because no county was mentioned except in the margin.

Comeb before me] A conviction ought to be in the present tense, and not in the time past. *L. Raym.* 1376. *Str.* 608. *Robert's case*. This rule holds universally with regard to the judgement; but the preceding acts of the justice, some of which must, and others may have occurred at a different time, may be stated according to the fact. Conviction to be in the present tense.

Thus, in *K. v. Hall*, *T. 26. G. 3.* where one objection was, that the information was not in the present tense; the court said, that the words objected to were better in the past than the present tense; because they referred to a time past, namely, the time of making the information. *Durnf. and East*, 1 *V.* 320.

It has, however, generally obtained in practice, to state the whole record of a conviction in the present tense.

J. P. esquire, being] In *K. v. Chipps*, *Str.* 711. exception was taken to a conviction, that information was given to such a one, *justice of peace*, but did not say *ad tunc* a justice; and he might be a justice at present, and not at the time of the information. But the court said, that the conviction set forth, that information was made to such an one, *existen' un' justic'*, &c. which must be intended that he was one at that time, and was sufficient without saying *ad tunc*.

One of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county] The name and stile of the justice, or justices, to whom an information is given, should be set forth in the statement of the information, that it may appear he or they had

authority to take such an information. *Salk.* 474. *Sir.* 261.

Residing near the place where the offence hereinafter mentioned was committed] In *Talbot v. Hubble*, *Sir.* 1154. it was decided, that though the 12 *Car.* 2. gives the jurisdiction in excise matters to justices of the peace residing near the place where the forfeiture shall be made or offence committed; yet it never was the design of the legislature to make any alteration in the respective jurisdiction of the justices, but only to vest the excise jurisdiction in justices of counties, cities, and places, with respect to their several local jurisdictions within such places.

On his corporal oath] Where the statute directs the information to be on oath, it should be stated to be so taken. *K. v. Willis*, *Boscawen* 16.

To be on a complaint precedent.

Give us the said justice to understand and be informed] A conviction ought to be upon an information or complaint precedent; and no information can be supported but by evidence of previous facts. *M.* 11 *W.* *K. v. Fuller*, *L. Raym.* 510. In *K. v. Kent*, *L. Raym.* 1546. the conviction was quashed, because the information was set out to be exhibited on 2 *Nov.* 1 *G.* 2. and the conviction was laid to be on 2 *Oct.* 1 *G.* 2.

The time of committing the offence to be stated;

That within ——— now last past; that is to say, on the ——— day of ———] The time of committing the offence must be stated, that it may appear the prosecution is commenced in due time, *Salk.* 369. and also, that the party may be enabled to defend himself against a second charge. *K. v. Katherall*, *Sir.* 900. But note, the offence need not be proved precisely of the day on which it is laid to have been committed, though it must be proved to have been committed within the time limited for the prosecution. And, for this reason, it has been held sufficient to state, that between such and such a time the defendant killed so many deer, without shewing the particular days upon which they were killed. *K. v. Chandler*, *Salk.* 378. *Carth.* 501. 5 *Mod.* 446. *L. Raym.* 582. and *Q. v. Simpson*, 10 *Msd.* 248.

and the place where committed.

At ——— in the county of ———] The information must specify the place where the offence was committed, that it may appear to have been committed within the jurisdiction of the justice. A conviction before the lord mayor of *London*, upon 16 and 17 *Car.* 2. c. 2. for selling coals contrary to that act, viz. less than 36 bushels to the chaldron, was quashed, because there was no place mentioned where the coals were sold, which ought to have been,

been, in regard that the power of the lord mayor is only in case of coals exposed to sale in the city of London and liberties thereof. *Q. v. Highmore, L. Raym. 1220.*

E. 26 G. 3. K. v. Jeffries. This was a conviction on the lottery act, 22 G. 3. c. 47. The information charged, that on the 10th of March 1786, Thomas Jeffries did, in Great Queen Street, in the parish, &c. take and receive of Thomas Jackson, 2s. 9d.; and, in consideration thereof, did agree to pay him one guinea, if No. 18,433. should be drawn on the 30th day of drawing the lottery. The evidence was, "That on the 10th March last, Jackson insured personally with the said Jeffries the said ticket, and paid 2s. 9d. to receive one guinea if drawn blank or prize on the 30th day of drawing." *Erskine* objected, that the evidence did not prove the offence to be committed in the place laid in the information, which it ought to have done; for wherever the jurisdiction of the magistrates, who try the offence, is local, the offence must be proved to have been committed within their jurisdiction. And of this opinion was the court. Conv. quashed. *Durnf. and East, 1 V. 241.*

One A. O. of — in the county of —] *K. v. Feme-coverts may be convicted.*
Crofts. Conviction on 9 G. 2. c. 23. for selling gin. It was objected, that it appeared the defendant was a *feme covert*, and therefore, as she could make no contract, it must be taken to be her husband's sale; or, if she could be convicted, he ought to have been joined, for conformity: And 2 *Keb.* 468. 479. 634. 1 *Sid.* 410. were cited. It was answered, that where the crime is of such a nature as can be committed by her alone, she may be indicted without her husband; which being a proceeding grounded merely on the breach of the law, he shall not be included unless privy. *H. P. C.* 65. 1 *Haw.* 3. 147. 6 *M. d.* 213. 239. In this case there may be imprisonment and whipping. *Et per curiam:* We think the conviction is right; for this is not like the cases that found only in damages: the wife may be convicted alone for recusancy. *Heb.* 96. 11 *Co.* *Forster's case.* And though she cannot have the benefit of the contract, yet she as well as a servant may do the act of vending. *Salk.* 384. *Cro. Jac.* 482. Besides, there would be a plain way to evade the act, if *feme-coverts* could not be convicted. *Sir.* 1120.

And to the description of the offence. All acts which subject men to new and other trials, than those by which they ought to be tried by the common law, ought to be taken strictly; and the court of king's bench will require that

it do appear upon the face of such proceedings, that the fact was an offence within the act, and that the justices have proceeded accordingly. *M. 1 An. K. v. Chandler.* 1 *Salk.* 378. *L. Raym.* 581. et vide *Burr. Mansf.* 613. *Burr. Mansf.* 2281. *Cowp.* 827.

The offence to
be particularly
set forth.

Therefore, the particular manner of the offence ought to be set forth. Thus, in the case of swearing before the legislature by the act of the 19 G. 2. had directed a summary form of words for the conviction, it was required not only to set forth that the person had cursed or sworn in general, but the particular oaths and curses were to be set forth, that the court might judge thereupon, whether they were indeed oaths and curses or not. *H. 8 G. K. v. Sparling, Str.* 497. *K. v. Popplewell, Str.* 686. *K. v. Chaveney, L. Raym.* 1368.

And in the case of *K. v. Roberts, M. 11 G.* which was a conviction for swearing 150 oaths in these words by God, and cursing 150 curses in these words God damn you, this matter was carried so far, that it was insisted this was not sufficient, but that the oaths and curses ought to be set forth 150 times each. But the oaths and curses being all only in the same words over again, the court held the conviction good. *Str.* 608. *L. Raym.* 1376.

And the quantity of the offence is more especially necessary to be shewn in cases where it is the measure of the penalty or damages to be given by the justice. Thus a conviction upon *stat. 43 Eliz. c. 7. s. 1.* against cutting of trees, &c. was quashed for not mentioning the number of trees cut, being the measure of the damages to be given in that case. *Q. v. Barnaby. L. Raym.* 900. *Salk.* 181.

It has been said, "it seemeth, that a conviction on "a penal statute ought expressly to shew, that the "defendant is not within any of its provisos; for," continues the author, "since no plea can be admitted to such a conviction, and the defendant can have "no remedy against it, but from an exception to some "defect appearing in the face of it, and all the proceedings "are in a summary manner, it is but reasonable that such "a conviction should have the highest certainty, and satisfy "the court, that the defendant had no such matter in his "favour, as the statute itself allows him to plead." 2 *Haw.* 250. But this is to be understood with the following limitation, that where the enacting clause of a statute constitutes an act to be an offence under certain circumstances and not under others, there, as the act is an offence only *sub modo*, the

the particular exceptions must be expressly specified and negatived; but where a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso in favour of particular cases, there the proviso is matter of defence or excuse which need not be noticed in the information.

Thus, the case of *K. v. Clarke*, E. 14 G. 3. was a conviction on 23 H. 8. c. 9. s. 16. against playing at bowls, and the court quashed it, because it was not alleged in the information, that the playing at bowls was out of the defendant's own orchard, and it is only unlawful *sub modo*. *Cowp.* 35.

Analogous to which is the case of informations upon 5 Ann. c. 14. s. 4. in which, it is now fully settled, that you must state and negative all the qualifications enumerated in the 22 and 23 Car. 2. *Vide Sir. 66. L. Raym. 1415. Burr. Mansf. 148.* And note, this is so necessary, that if the qualifications mentioned in the 22 and 23 Car. 2. are omitted to be set out and negatived in these informations, their being negatived by the evidence will not supply the defect. *K. v. Whatman*, Doug. 331.

So, where in a conviction upon 43 Eliz. c. 7. whereby it is enacted, that if any person shall rob an orchard, *not being felony by the laws of this realm*, being thereof convicted, &c. he shall give the party such recompense as by the justice shall be ordered, it was stated, that J. S. made oath before the justice, that the defendant *Martha Chapman* did rob the orchard of *Thomas Whitby*, the robbery not being felony by the laws of this realm; and that thereupon the justice did adjudge, &c. *per Ryder*, Ch. J. These words in the present conviction, *the robbery not being felony by the laws of this realm*, are not a sufficient particular description of the offence. The manner of the stealing ought to have been stated; that the court might have judged whether it were felonious, and consequently whether the justice had a jurisdiction. *K. v. Chapman*, Say. Rep. 203.

But in the case of *K. v. Ford*, T. 9 G. there was a conviction on 3 G. c. 3. for keeping an alehouse without licence; and it was objected, that in the act there was a proviso to exempt persons who had been punished by the former law of the 5 and 6 Ed. 6. c. 25. and therefore it should have been said, he had not been proceeded against upon that act: but by the court, That coming in by way of proviso, he should have insisted on it in his defence; it appears he was asked what he had to say, and therefore

we may reasonably presume he had no such defence to make. And the conviction was confirmed. *Str.* 555.

And in the case of *K. v. Bryan, M.* 12 G. 2. the defendant was convicted on the gin act; and an exception was taken, that there was no averment that it was not sold to be used in medicine: And the cases on the game act were mentioned, where in convictions it is necessary to exclude all the qualifications for killing game. On the other hand, it was insisted, that the reason of that was, because those were in the enacting clause, whereas this about medicine comes in by way of proviso, and is, by way of defence, to be shewn on the defendant's part: and for that purpose was cited *M.* 11 G. K. v. *Theed, Str.* 608. where, in a conviction for obstructing an excise officer on the 8 *An. c. 9.* it was objected, that it not being averred to be in the day, it should have been shewn that there was a constable present, which is made necessary in the night; but was held to be well, and its being in the night should have been shewn on the defendant's part. And by the court, This is brought within the general enacting clause: and the true distinction is, where the extenuation comes in by way of proviso or exception; and the conviction was confirmed. *Str.* 1101.

But where the prosecutor is not obliged to negative the exceptions in a statute, and negatives some of them only, that part of the information will be rejected as surplusage; and if a subsequent statute make an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception. *K. v. Hall, T.* 26 G. 3. *Durnf. and East, 1 V.* 322.

And in general, it is sufficient for the justices, in the description of the offence, to pursue the words of the statute, *L. Raym.* 581. whence it results, that any description not within the words of the statute is not sufficient. *K. v. Luwelin, 1 Show.* 48. *Q. v. Moore, L. Raym.* 791.

So, a conviction on 22 and 23 *Car. 2. c. 25. s. 7.* against *unlawfully killing and taking fish in any river, &c. without the license or consent of the lord or owner of the waier,* was quashed, because it did not describe the offence in the words of the statute, or say that the defendant *stole* the fish, or took and killed the fish of *another person*, or in *another person's pond* *K. v. Mullinson, Burr. Mansf.* 682.

So, in the case of *K. v. Trilawny, E.* 26 G. 3. the conviction, which was on the statute 22 G. 3. *c. 47. s. 13.* against insuring tickets in any state lottery to be authorized by act of parliament, was quashed, because the information

ation did not express, that the ticket insured was a ticket in the *State* lottery, though the lottery was described as being authorized by the statute 25 G. 3. *Dunf. and Euß*, 1 V. 222.

Whereupon, on the — day of — in the year aforesaid, The party to be summoned. *Uc. I the said justice do issue my summons]* T. 11 G. K.

v. Venables. The court were unanimously of opinion, that the party ought to be heard, and for that purpose ought to be summoned in fact; and that if the justices proceeded against a person without summoning him, it would be a misdemeanor in them, for which an information would lie. *L. Raym.* 1406. *Str.* 630.

And in the case of *K. v. Allington, H.* 12 G. on affidavit that no summons was had, the court granted an information against the justice who made the conviction. *Str.* 678.

Directed to] The summons may be directed either to the offender, requiring him to appear, or to some third person, requiring him to summon the offender.

Requiring the said A. O. to be and appear before me on the — day of —] Natural justice requires that the defendant should have a reasonable time allowed him for making his defence. A conviction upon default of appearance, where the summons was to appear immediately upon the receipt of it, was held bad. *K. v. Mallinson, Burr. Mansf.* 679.

H. 6 G. K. v. Johnson. The defendant was convicted for keeping a gun; and exception was taken, that there was not a reasonable summons; for it was made to appear the same day, which might be impossible upon account of the distance, or the summons being served late; and his witnesses might not be got together on so short a warning: then it was to appear *at the parish aforesaid*, whereas there were two parishes mentioned before; so the man might have gone to one, whilst they were convicting him at the other. It was answered, that the defendant appeared at the time, and made defence; so that cures all defects in the summons; and by the court, the answer is right. *Str.* 261.

It has been made a question, whether a conviction upon default of appearance, stating, that the defendant was duly summoned, without more, would be good: as to which it may be sufficient to observe, that in order to authorize a justice to proceed to convict in the absence of a defendant, it is necessary to prove that he has been summoned, and consequently, that upon such proof, if duly made, the reasonableness of

such summons must appear, by reference to the time when it was served and the time it prefixes to the party. The case of *K. v. Venables*, 11 G. 1. *Sess. Ca.* 210. *L. Raym.* 1405. where this question was agitated, and where it was held, that the summons need not be set forth, is the case of an order, which is discretionary with the justices, and not the case of a conviction. The case of *Q. v. Green*, 10 *Mod.* 213. on the same subject, is too loose for an authority, had it even decided the point; and in *K. v. Simpson*, *Str.* 46. the objection was as to the certainty of the time and place prefixed by the summons, and not as to its reasonableness. And, *per Holt Ch. J.* "Of common right the party ought to be summoned, if possible, and it would be well to set forth, that he was summoned and appeared, or did not appear, or could not be found to be summoned; and though the act of parliament (in the particular case) orders the offender should be convicted, yet that must be intended after summons, that he may have an opportunity of making his defence: and this summary jurisdiction ought to be held strictly to form, and every thing ought to appear regular in them; and they ought to make a memorandum that such a day complaint had been made, that thereupon a summons issued returnable such a day, and that the party being summoned did, or would not, appear, or could not be summoned," &c. 6 *Mod.* 41.

At — of the clock in the forenoon] It is in general convenient to fix the time for the attendance of the parties precisely; though, according to the foregoing form, it will appear, that they ought not to be held to a very punctual attendance.

Duly serve, &c.] The service of the summons should be proved upon oath, and it seems, that such service should, in general, be a personal one.

Therefore I the said justice do proceed to examine] *H. 3 G. K. v. Simpson.* The defendant was convicted for deer stealing; and the conviction set forth, that he had been summoned to appear before the justices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment, as it may do here for want of a distress. And, at another day, on consideration, *Parker Ch. J.* delivered the resolution of the court: We are all of opinion, the offender may be convicted without appearing. The statute is silent

as to the method of proceeding, and the law of *England*, it is true, in point of natural justice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default; were it otherwise, every criminal might avoid conviction. *Str.* 44.

Whereupon the said A. O. having been duly summoned] It is evident, that if the defendant appear and make defence, it must be taken that he was duly summoned; therefore, in such case it is unnecessary to say more, and his appearance cures any defect in the summons, or even the total want of one. *Str.* 261. *Salk.* 383. *Burr. Mansf.* 1785.

Upon the ——— day of ———, &c. appeareth] *Q. v. Dyer.* Conviction set forth that the defendant appeared on *Tuesday the 17th day of April 1702*, whereas in fact there was no such day, but the 17th day of *April 1702* was on a *Friday*. *Et per curiam*, it is manifest there could be no such day, and therefore he could not appear thereupon; and when one day is set forth, his appearance on another cannot be intended. Conviction quashed. *Salk.* 181. *6 Mod.* 41.

And he the said A. O. having heard the same, is asked, &c.] The defendant should be apprized of the charge against him and put to plead thereto, that is, either to confess or deny it, before the justice proceeds to hear evidence in its support.

And thereupon the said A. O. freely and voluntarily confesseth] In general, if the defendant confesses the offence, it is needless to go into the proof of it. But this is to be understood of a confession to the full extent of a good and sufficient information; for where either the confession does not come up to the charge in the information, or is made upon an insufficient information, it will not supply the want of evidence in the one case, or of a sufficient charge in the other.

Thus, in *K. v. Little*, confession by the defendant of a single fact of offering to sell silk handkerchiefs without a licence, was held not sufficient to convict him of trading as a hawker, pedlar or petty chapman, without licence; because a *single act* of selling a parcel of silk handkerchiefs to a *particular person*, is not a proof that he was such a hawker, pedlar or petty chapman, as ought to have taken out a licence. Conviction quashed. *Burr. Mansf.* 613. Had the confession been, that he had

Conviction.

traded as a *hawker*, it would have been sufficient. *K. v. Smith, Burr. Mansf. 1475.*

K. v. Corden, was the case of a confession of an insufficient charge; and the conviction, which was on 5 G. 3. c. 14. for preserving fish, not being on the complaint of the owner, or shewing his dissent to the fishing, and the property not being proved on oath, was quashed. *Burr. Mansf. 2279.*

As to the power of the justices to take the confession of the defendant. In *K. v. Gage, Str. 546.* it was excepted to a conviction on 5 Ann. c. 14. that it was upon the confession of the defendant, which the act had given the justices no power to take; having only given them jurisdiction to convict upon the oath of one or more credible witnesses. *Sed per curiam (prater Eyre, J.).* the conviction must be confirmed. The intent of mentioning the oath of one witness was only to direct the justices, that they should not convict on less evidence.

K. v. Hall, T. 26 G. 3. The conviction, after setting forth the information, stated the appearance of the defendant, when the said information, together with examinations in writing of two witnesses, which were also set forth, being read, the defendant was asked for his defence, and pleaded guilty. It was objected, that it appeared the evidence was not given in the presence of the defendant, which it ought to have been; that the defendant should have been called upon to plead to the charge before any evidence was received, but that instead of that, the justice read over improper evidence which should not have been given, and then called on the defendant to answer the premises, by which means the defendant was confounded and induced to plead guilty. But the court said, the objection was cured by the defendant's having pleaded guilty. *Durnf. & East, 1 V. 320.*

Witness to be
named.

One credible witness, to wit, A. W. of ——— yeoman]
It is requisite to name the witness, that it may appear he is not the same person who was the informer; for an informer who hath a share of the penalty, is never allowed to be a witness, unless in case where a statute shall specially so direct it. *L. Raym. 1545. 1 Sess. Ca. 378.*

Evidence to be
set forth.

On his oath aforesaid affirmeth and saith, in the presence and hearing of the said A. O.] In all convictions, being in the nature of judgments, the whole evidence ought to be set forth, or at least so much thereof as is sufficient to warrant the conviction; that the court of king's bench

may judge of the sufficiency thereof: but otherwise it is in orders which are authoritative. And so it was laid down in the case of *K. v. Lloyd*, *M.* 8 G. 2. which was thus; a motion was made to quash an order of sessions, made under the statute of the 1 W. c. 21. s. 6. whereby the defendant was adjudged guilty upon full proof of the charge against him, and that he be discharged from his office of clerk of the peace, upon the objection that the evidence is not set out: but it was adjudged after consideration, that this was an order, and therefore the evidence need not be shewn: but that it would be otherwise if it was a conviction. *Andr.* 82. *Str.* 996.

M. 5 G. 2. *K. v. Theed*. A conviction on the candle act was quashed, because the evidence was not set out; it being only alleged, that the offence was fully and duly proved. *Str.* 919. 2 *Barnard.* 16. 73.

T. 6 G. K. *v. Baker*. A conviction for taking pilchards against the form of the statute, quashed: because the witness swears generally that the defendant is guilty of the premises, and that is taking upon himself to swear the law: *Str.* 216. *Q. v. Green*, 10 *Mqd.* 213. *S. P.*

E. 1 G. 3. *K. v. Vipont* and others. The conviction was, that the defendants, having heard the charge, (of conspiring to advance their wages in the woollen manufacture,) and being called upon by the justices to shew cause why they should not be convicted, and having nothing to say whereby to defend themselves, are therefore convicted: and quashed by the court; because the evidence ought to be particularly set forth, that the court may judge thereof; and it must be given in presence of the defendant, that he may have an opportunity of cross-examination. *Burr. Mansf.* 1163. *K. v. Crowther, Durnf and East*, 1 V. 127. and *K. v. Benwell*, *Id.* 6 V. 75.

To be given in the presence of the defendant.

E. 7 G. 3. *K. v. Killst*. The defendant, being a clergyman, was convicted for neglecting to read the act against profane cursing and swearing. The conviction fully set forth the offence as charged in the information: and then goes on, setting forth that the defendant was summoned, and having neglected to appear, the justice proceeded to examine into the truth of the charge, and the same, as set forth, being duly proved before him, he adjudges the defendant guilty. By the court: It is now fully settled, that upon a conviction the evidence ought to be set out, that the court may judge whether the justices have done right; but upon an order it is not necessary. *Barr. Mansf.* 2063.

But,

But, though the evidence ought to be given in the presence of the defendant, if the appearance of the defendant and the examination of the witness are both stated of the same day, the court will presume, that the witness was examined in the presence of the defendant, though it be not expressly so stated. *Burr. Mansf.* 1786. *Cowp.* 241. *Durnf. and East*, 2 V. 23.

By the above cases, as well as many others, it has been decided, that the evidence should, in general, be more particular than the information. *Vide K. v. Little*, *Burr. Mansf.* 609. and *K. v. Thompson*, *Durnf. and East*, 2 V. 18. *Sed vide title Game*, 2 V. 352, &c.

The said A. O. is by me the said justice asked what he hath to say in his defence] If the defendant, when put on his defence, sets up a claim of right to the thing he is accused of taking or destroying, and there is any pretence or colour for such right, the justice ought to acquit him. *Per* *Ld. Ch. J. Holt*, in *K. v. Speed*, *L. Raym.* 583.

In general, as the justices are in the place of jury as well as judge, and are the only judges of the credit due to the witnesses, it does not seem necessary to set forth the evidence on the part of the defendant, unless it be such as entitles him to an acquittal.—So, where the justices acquitted the defendant, upon evidence which, *prima facie*, was sufficient to convict, and there being no contradictory or explanatory evidence; the court said, that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had acquitted the defendant, the court could not substitute themselves in the place of the justices acting as jurymen, and convict him. That they could not judge of the credit due to the witnesses whom they did not hear examined. That they could only look to the form of the conviction, and see that the party, if convicted, had been convicted by legal evidence. *K. v. Reason*, *Durnf. and East*, 6 V. 376.

Two offences in one conviction.

Do convict the said A. O. of the offence aforesaid] *B.* 26 *G. 3.* *K. v. Solomons.* This was a conviction on the lottery act, 22 *G. 3. c. 47.* The information as set forth in the conviction was, *that Solomons did keep an office for dealing in shares of lottery tickets without a licence; and also did keep an office for registering the numbers of lottery tickets without a licence, &c.* and the said *Solomons* was thereupon convicted of the said offence charged upon him, in and by the said information, &c. according to the form of the statute, &c. for which said offence he was adjudged to have

have forfeited 100 l. By the court: The conviction is bad, for there is a duplicity of charge; the defendant is charged with *dealing in shares of lottery tickets*, and with *registering tickets without licence*; and he is convicted of the *said* offence, so that it does not appear of which offence he is convicted. A conviction must be good in all its parts; the information must be supported by the evidence, and the judgment must be supported by both. Here the defendant is charged with two distinct offences, each of which would subject him to a separate penalty; and supposing they could have been included in one conviction, which is to be doubted, the defendant should have been convicted of both. A judgment for too little is as bad as a judgment for too much. Conviction quashed. *Durnf. and East*, 1 V. 249.

T. 27 G. 3. K. v. Thompson. To this conviction, which, after setting forth the evidence, stated, *thereupon the defendant on, &c. at, &c. before me, &c. by the oath of one credible witness, according to the form of the statute is convicted*; it was objected, that it did not appear upon the conviction, of what the defendant had been convicted. That the words of the conviction are only a conclusion of law, and not an adjudication of the justice. That there is nothing to connect it with that which precedes it, such as that *he is convicted of the premises, or in manner and form aforesaid*. But the court were clearly of opinion there was no ground for the objection, and affirmed the conviction. *Durnf. and East*, 2 V. 18.

And for his offence aforesaid hath forfeited] *H. 3 G. 2. Forfeiture. K. v. Hawkes.* A conviction for killing a deer was quashed, because it was only — *he is convicted*, without any judgment of forfeiture. *Str.* 858.

And in the aforesaid case of *K. v. Vipont* and others, the conviction *not adjudging the forfeiture*, was for that reason, as well as the other above mentioned, determined to be ill; especially as the statute, upon which the conviction was made, leaves the judgment discretionary concerning the duration of the punishment, the offender being to be imprisoned by the justices for any time not exceeding three months. *Burr. Mansf.* 1163. *et vide K. v. Ashton*, 8 Mod. 175.

So, in the case of *K. v. Elwell* and others, the commitment being, that the defendants should lie in prison till they pay their fine; and no fine being set, the court quashed the conviction. *L. Raym.* 1514.

So, a commitment for non-payment of the penalty and charges on a conviction on 6 G. 1. c. 48. against cutting
down

down timber trees, (which is in the alternative, that upon non-payment of the penalty and costs, the offender shall be committed to gaol for any time not exceeding twelve months nor less than six, or until the penalty and charges shall be paid,) was held illegal, because, as the conviction did not ascertain any sum for costs or charges, the time of imprisonment was uncertain. Conviction quashed, and the defendant discharged. *K. v. Hull, Cowp. 60.*

Distribution.

To be distributed as the law directs] *M 9 Ann. K. v. Barret.* A conviction for deer stealing did set forth, that he is convicted and shall forfeit 30l. according to the form of the statute, without making a distribution, which ought to be 10l. to the informer, 10l. to the party grieved, and 10l. to the poor. But by the court, this is well enough. *1 Salk. 383.*

M. 28 G. 3. K. v. Dimpsey, Potts, and others. The defendants were severally convicted before three justices, for refusing to receive soldiers regularly quartered and billeted upon them. These convictions were removed by *certiorari*, for the purpose of taking the opinion of the court upon the construction of the mutiny act, whether alehouse keepers are bound to take in natives as well as soldiers. But as there was a decisive objection to the form of the convictions, the general question was not discussed. Each of the convictions concluded as follows: *And we do adjudge, that for the offence aforesaid, be the said defendant hath forfeited the sum of 5l. of lawful money of Great Britain, to be disposed of as the law directs.*—Law objected, that there was no distribution of the penalty by the justices. The penalty is directed to be applied, in the first place, to make satisfaction to the soldier for any expence he may have been put to, by reason of his not being billeted as the justices shall direct, and the remainder is to be paid to the poor of the parish. He admitted, that where the statute distributes the penalty in certain proportions, it need not be distributed by the justices in the conviction; but where it is discretionary in the justices to distribute the penalty in such proportions as they shall direct, that distribution must appear upon the conviction itself.—*Erskine contra.* The justices were not bound to set forth in the conviction the manner in which they have exercised their discretion as to the distribution of the penalty. At the time of the conviction the penalty is not levied, and *non constat* that it ever will; so that it is impossible to distribute it till it is raised. It may be done at a subsequent time, and the court will not presume that the justices will not do their duty. *Per*

curiam:

In what case to
be made by the
justices:

curiam: A judgment is an entire thing; and one part of it cannot be given at one time, and another at a subsequent period. The distribution of the penalty is part of the judgment, and it ought to appear on the record. Conviction quashed. *Durnf. and East*, 2 V. 96.

Do mitigate] The mitigation of penalties is not of course, but depends upon the power given to justices by particular acts of parliament, to exercise their discretion in this case, within certain bounds, in the instances mentioned in those acts.

And I do adjudge that the said A. O. do forthwith pay to the said A. l. the sum of — of like lawful money for his costs] By 18 G. 3. c. 19. where any complaint shall be made before any justice or justices of the peace, and any warrant or summons shall issue in consequence of such complaint, that then it shall be lawful for such justice or justices, who shall have heard and determined the matter of the said complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured (a).

In witness whereof, I the said justice to this record of conviction have put my hand and seal] A conviction should be under the hand and seal of the magistrate: and a justice ought to give the defendant a copy of the conviction, if he demands it; it is a record, and he is entitled to it. *K. v. Midlam, Burr. Manif.* 1720.

After all; these convictions being tedious and troublesome, are seldom drawn up in form, till occasion calls them forth; as if they be to be recorded at the sessions, or removed into a higher court by *certiorari*. But by *Buller J.* A justice of peace ought in every instance to return a conviction by him to the sessions, whether the party appeals or not, or whether an appeal is or is not given, that the crown may not be deprived of its share of forfeitures. *Durnf. and East*, 2 V. 285.

Convictions to be returned at the session

Note; On a suggestion that the defendant hath a title to the thing in question, a prohibition will be granted by the king's bench, before or after a conviction, to stay the justice from proceeding; for without doubt, if the defendant have but a colour of title, the justices have no jurisdiction in the cause; as where the defendant was convicted for cutting trees, where he had a right of common. *L. Raym.* 901.

(a) For the manner of levying such costs, and other regulations made by 18 G. 3. c. 19. See *Post.* title *Costs*.

Cordage for Shipping.

Short chucking, &c. not to be used in making cordage for shipping.

BY the 25 G. 3. c. 56. No person, after 25th July 1785, shall use, in the making of *cables, hawsers*, or other ropes for the use of shipping, or knowingly sell the same, in the manufacturing whereof there shall have been used any hemp, usually known by the names of *short chucking*, half clean, whale line, or other topping, cordilla, damaged hemp bought at publick or other sales, or any hemp from which the staple part thereof shall have been taken away by the manufacturer; on pain of forfeiting (if he be the manufacturer thereof) such cable, hawser, or other rope, and treble the value thereof; and if the vender (and not the manufacturer), he shall forfeit a sum equal to treble the value thereof. *s. 2.*

Cordage to be distinguished as *staple* and *inferior*.

And for the better distinguishing the quality of such ropes, whenever the same shall be manufactured in whole or in part, the use whereof is not prohibited by this act, and the quality whereof shall be inferior to clean *Petersburgh* hemp, the same shall be deemed *inferior cordage*, and the maker shall distinguish the same by running from end to end thereof, three-tarred mark yarns, spun with turn contrary to that of rope yarn, and also one like tarred yarn in every other rope for the use of shipping; and shall mark or write on a tally to be affixed thereon, the word *staple* or *inferior* (as the case shall be), and also his name signed by himself or his attorney, together with the name of the place where manufactured; and in default thereof every such manufacturer shall forfeit 10s. for every hundred weight. *s. 3, 4.*

And maker's name to be affixed.

Penalty on putting a false name to cordage.

And if any such rope-maker shall wilfully or knowingly permit or suffer his name to be put as aforesaid to any such ropes, not being of his own proper manufacturing; or if the vender or proprietor of any such ropes, or any other person whatsoever wilfully and knowingly mark upon the tally affixed thereon, the name of any person not being the manufacturer thereof, he shall forfeit 20 l. *s. 5.*

Penalty on making cables of old stuff.

And if any person shall make any cables of any old or worn stuff, which shall contain above 7 inches in compass, he shall forfeit four times the value thereof. *s. 6.*

Importing cordage.

And when any ship belonging to any of his majesty's subjects resident in *Great Britain* or in the *British Colonies*, shall come into any port in this kingdom, the master, at the time of making his entry at the custom house, shall make entry on oath of all foreign made cordage

dage on board for which no duties have been paid (standing and running rigging in use excepted); and such master shall, before such ship be cleared inwards, where any discharge shall be made of her lading, pay for such foreign made cordage as shall be specified or mentioned in the said entry, the like duties as by the laws now in being are charged upon foreign made cordage imported into this kingdom; and if such master shall make default herein, such foreign made cordage on board such ship shall be forfeited, and he shall also forfeit 20 s. for every hundred weight thereof. *f. 8.*

But the same shall not extend to cordage brought from the *East Indies*; nor to the materials at present in the use of any ship built abroad before the passing of this act the property of any *British* subject. *f. 9, 10.*

All pecuniary penalties or forfeitures by this act imposed exceeding 5 l. are to be recovered in the courts of *Westminster*; if not exceeding 5 l. the same may be levied by distress, by one justice, on the oaths of *two* witnesses; and if sufficient distress cannot be found, such justice shall commit the offender to the common gaol or house of correction for any time not exceeding three calendar months, nor less than seven days, or until such penalty and all costs and charges shall be paid. And all such penalties and forfeitures, and also all cordage which shall be forfeited, shall be paid and delivered to the person who shall sue, who may sell or otherwise dispose of such cordage (after being cut into lengths not exceeding 12 feet) to his own use. *f. 7.*

Penalties how
to be recovered
and applied.

Provided always, that if any person shall think himself aggrieved by any thing done in pursuance of this act, and for which no particular method of relief is appointed, he may, within four months after such matter shall have been done, appeal to the sessions, giving 14 days notice in writing of his intending to appeal, and the matter thereof, to the person appealed against, and within four days after giving such notice, entering into recognizance before some justice with two sureties, to try such appeal, and abide the order, and pay such costs as shall be awarded at such sessions: and on due proof of such notice, and entering into such recognizance as aforesaid, the justices at such sessions shall hear and finally determine such appeal, and award such costs as they shall think proper; which determination shall be final and conclusive. *f. 11.*

Appeal

And no order, verdict, judgment, or other proceeding, shall be quashed for want of form only, or be removed by
-VOL. I. K k certiorari

Proceedings not
to be quashed
nor disturbed

deemed unlaw-
ful for want of
form.

certiorari or other writ into any other court; and such distress shall not be deemed unlawful, or person making the same a trespasser on account of any defect or want of form in the proceedings; nor shall the party distraining be deemed a trespasser *ab initio* on account of any irregularity which may afterwards be done by the party distraining; but the person aggrieved may recover special damage in an action upon the case, but no plaintiff shall recover in such action, if sufficient tender of amends hath been made before such action brought. *f. 12.*

Corn.

I. The measure of corn.

II. Cutting corn growing, or burning stacks of corn.

III. Ascertaining the prices of corn.

IV. Exportation and importation of corn.

V. City of London, and Kent, Essex, and Sussex.

VI. Obstruſing the free paſſage of corn.

I. The measure of corn.

Buying corn in
the ſheaf with-
out meaſuring.

TO buy or ſell corn in the ſheaf, before it is threshed and meaſured, is againſt the common law of *England*; and the reaſon thereof ſeemeth to be, for that by ſuch ſale the market is in effect foreſtalled. *3 Inſt. 197.*

Selling corn
otherwiſe than
by *Wincheſter*
meaſure.

If any perſon ſhall ſell corn otherwiſe than by *Wincheſter* meaſure ſealed and ſtricken by the brim he ſhall forfeit 40s. on conviction before one juſtice, on the oath of one witneſs; to be levied by the churchwardens and overſeers, or ſome of them, to the uſe of the poor, by diſtreſs and ſale. In default of diſtreſs, imprisonment till paid. *22 C. 2. c. 8. f. 2.*

And if any mayor or other head officer ſhall knowingly permit the ſame, he ſhall upon conviction thereof at the county ſeſſions, forfeit 5l. half to the proſecutor, and half to the poor, by diſtreſs and ſale; for want of diſtreſs, to be imprisoned by warrant of the juſtices, till payment be made. *f. 3.*

And

And moreover every person who shall sell or buy corn, without measuring, being thereunto required, or in any other manner than is by the 22 C. 2. c. 8. directed, and that without shaking of the measure by the buyer, he shall, besides the penalty of that act, forfeit all the corn so bought or sold, or the value thereof, to the party complaining. 22 & 23 C. 2. c. 12. s. 2.

Selling or buying corn other than by Winchester measure.

T. 32 G. 3. K. v. J. Major. This was a conviction on the above statutes for buying corn at Newport in the Isle of Wight by a bushel different from the Winchester measure. It appeared that the corn was bought by the customary measure used in the Isle of Wight, which contains a pint more than the Winchester measure. The defendant was convicted in 40s. and 10l. 15s. being the value of the wheat sold. The court said that, as this was a question of general concern, they would take time to consider of it.—L. Kenyon, Ch. J. delivered the opinion of the court. We have hitherto delayed giving judgment in this case, in the hopes of discovering that the farmers in general have been acting under a mistake; for it is a matter of notoriety that in different parts of the country corn is sold by different measures, some greater and others less than the Winchester measure. This question depends on 22 C. 2. c. 8. and the 22 & 23 C. 2. c. 12. The former imposes a penalty of 40s. on any person who shall sell corn or grain, usually sold by bushel, by any other bushel or measure than the Winchester measure; the latter recites the former act, and in order to enforce it, subjects both the buyer and seller to an accumulative penalty, the value of the corn sold. These acts are expressed in the most positive terms; and it was admitted in the argument, that there was no subsequent law, which directly repealed them. But several other statutes for the regulation of the corn trade were referred to, directing returns of the average price of corn to be made, and noticing in those returns a customary measure. These, it was argued, obliquely, though not directly, repealed the statutes of C. 2. We have considered this matter very fully, and are of opinion that the argument does not lead to that conclusion. We cannot get rid of those positive laws by a reference to subsequent statutes which were passed for another purpose, and which leave the former ones still in force.—Conviction affirmed. Durnf. and East. 4 V. 750.

Also in the case of K. v. Arnold, T. 33 G. 3. which was a conviction against a buyer of corn by a measure different from the Winchester measure. And as the conviction was affirmed it is here given as a precedent: Be it remembered,

that on the 5th day of January in the year of our Lord 1793, at Huntingdon in the said county of Huntingdon, Robert Booth, of Huntingdon aforesaid in the said county, esquire, cometh before us Lance!ot Brown and Henry Poynter Stanley, esquires, two of his majesty's justices of the peace in and for the said county, and giveth us to understand and be informed, that Joseph Arnold, of Eaton Socon in the county of Bedford, yeoman, after the 25th day of March in the year of our Lord 1670, to wit, on the 20th day of December in the year of our Lord 1792, at the parish of St. Neots in the said county of Huntingdon, did unlawfully buy of and from one William Peters a certain quantity of wheat containing divers, to wit, fifteen bushels in a different manner than by any bushel or measure agreeable to the standard marked in his majesty's exchequer, commonly called the Winchester measure, containing eight gallons to the bushel, and no more or less, contrary to the form of the statute in that case made and provided; whereby and by force of the statute in that case made and provided, the said Joseph Arnold hath incurred the several forfeitures and penalties thereunto annexed. And thereupon afterwards on the 12th day of January in the said year of our Lord 1793, the said Joseph Arnold, being duly summoned to answer the charge aforesaid, personally appears for that purpose at Huntingdon aforesaid in the said county, before us the said justices, and having heard the said information, and being asked if he can say any thing for himself, why he should not be convicted of the premises above charged upon him, the said Joseph Arnold admits that he the said Joseph on the 20th day of December in the year of our Lord 1792, at the parish of St. Neots aforesaid in the county aforesaid, did buy of the said William Peters the said quantity of wheat in the said information mentioned, at and for the price or sum of 3*l*. 19*s*. 6*d*.; but the said Joseph Arnold further says, that he is not guilty of the said offence charged upon him in and by the said information; and thereupon the said Joseph Arnold is asked by us the said justices, if he has or can produce any evidence to shew that he bought the said wheat by any bushel or measure agreeable to the standard marked in his majesty's exchequer, commonly called the Winchester measure; but the said Joseph doth not offer any evidence touching the premises, nor doth he require any time for that purpose: Whereupon it appearing to us the said justices that the said Joseph Arnold is guilty of the premises charged upon him in and by the said information; therefore it is adjudged by us the said justices, that the said Joseph Arnold is convicted, and is hereby accordingly convicted by us, of the offence charged upon him as aforesaid: And we do further adjudge, that the said Joseph Arnold hath for his said offence forfeited the sum of 3*l*. 19*s*. 6*d*. being the value

value of the said wheat so bought by him as aforesaid, to be applied and distributed according to law: And we do also adjudge; that the said Joseph Arnold hath forfeited for his said offence the further sum of 40s. to be applied and distributed according to law: And we do further adjudge, that the said Joseph Arnold do forthwith pay to the said Robert Booth the sum of 12 s. for the costs in and about the premises. In witness whereof we have to this record of conviction set our hands and seals at Huntingdon aforesaid in the said county, this 12th day of January in the year of our Lord 1793.—*Sellen* took several objections to this conviction. 1st, The defendant is convicted in 40 s. besides the value of the corn, whereas he is only liable to the latter penalty inflicted by 22 & 23 C. 2. c. 12. The first act 22 C. 2. c. 8. only affects the seller. 2dly, The quantity of corn bought is not sufficiently ascertained, nor is any price fixed on it in the information. 3dly, The offence is charged to be contrary to the statute, whereas if the defendant be liable to both the penalties, it is contrary to two statutes. 4thly, The defendant is adjudged to pay costs, whereas none are given by the statute.—*Lens contra*, after referring to the 18 G. 3. c. 19. (a), which enables justices to give costs in their discretion, was stopped by the court.—*L. Kenyon*, Ch. J. I am sorry that the obstinacy of the farmers in some parts of the kingdom has partly defeated the provisions of the statutes of C. 2. because after the case of *K. v. Major* (above) was decided, we had an opportunity of knowing from the grand juries in different counties that that decision gave great satisfaction. In order to decide this case, we have only to look at the very words of the statute 22 & 23 C. 2. which expressly subjects the buyer to both the penalties; for it is thereby enacted, that the buyer shall forfeit and lose, besides the penalty of the former act, all corn bought, &c.; that is, he is to forfeit the value of the corn, in addition to the penalty of 40s. imposed by the former act. Nor is there any objection in saying that this forfeiture is an offence against the form of the statute; for all that respects the buyer is prohibited by 22 & 23 C. 2. On reading over the case at first, I thought that the objection intended to be taken was, that the evidence did not support the charge: but I observe that the proof of buying according to the regulations of the statute is, by s. 3. thrown on the defendant.—*Abbott*, J. concurred.—*Buller*, J. The statute 22 & 23 C. 2. c. 12. instead of

(a) See title Costs.

saying expressly that the buyer shall be liable to the penalty of 40s. and to a forfeiture of the corn so bought, has said the same thing impliedly; for it says that he shall forfeit and lose, besides the penalty of the former act (which is a penalty of 40 s.), the corn so bought, &c. With regard to the objection, that the quantity is not sufficiently ascertained, an information before two magistrates need not be more particular than an information filed in this court; and in the latter case an allegation that the defendant "bought a certain quantity of wheat, containing, to wit, 15 bushels," would be sufficiently certain; and here the evidence has particularized it. *Per Cur.* Conviction affirmed. *Dunf. and East, 5 V. 353.*

Proof to lie on the owner.

And on complaint made to a justice of the peace, that corn hath been bought, sold, or delivered contrary to this act, the proof shall lie upon the defendant, to make it appear by the oath of one witness, that he sold or bought the same lawfully: wherein if he shall fail, he shall forfeit as is said before, to be levied by distress and sale; which shall by the justice be distributed, half to the poor, and half to the informer. 22 & 23 C. 2. c. 12. s. 3.

Distribution of the penalty.

Measure to be observed by corn inspectors.

By the 31 G. 3. c. 30. the bushel by which all corn shall be measured and computed for the purposes of this act, shall be the *Winchester* bushel, and a quarter shall be deemed to consist of 8 bushels; and the justices of each county, and the mayor of such cities or towns as are counties of themselves, or enjoy exempt jurisdictions, and from which returns are by this act directed to be made, shall cause a standard *Winchester* bushel to be provided and kept; and all measure shall be computed by the stricken and not by the heaped bushel: And where corn shall be sold by weight, 57 lb. avoirdupoise of wheat shall be deemed equal to one *Winchester* bushel; and 55 lb. of rye; 48 lb. of barley; 42 lb. of beer or bigg, and 38 lb. of oats; and further, that 56 lb. of wheat-meal, 45 lb. of wheat-flour, 53 lb. of rye-meal, 48 lb. of barley-meal, 41 lb. of beer or bigg-meal, and 22 lb. of oat-meal, shall be deemed equal to every such bushel of corn unground. And for the more easy measuring ground corn in sacks, the proper officer may make choice of and weigh two sacks out of any number not exceeding twenty, and so in proportion, and thereby compute the quantity of the whole. s. 82.

Corn sold by weight.

Weighing corn in sacks.

Table to be put up.

And the inspector of corn returns shall make a comparison between the *Winchester* measure, and that commonly used in the city or town for which he is inspector,

and within one month after his appointment, shall cause a statement in writing of such comparison to be hung up in some conspicuous place in the market and town hall of such city or town; and shall renew the same if defaced, and shall return a copy thereof to the receiver of corn returns. *f. 83.*

II. Cutting corn growing, or burning stacks of corn.

Every person who shall unlawfully cut or take away any corn or grain growing, being convicted thereof by confession, or oath of one witness, before one justice, shall for the first offence pay such damages as the justice shall appoint: and if the justice shall think him not able or sufficient, or if he do not pay such damages, he shall commit him to the constable where the offence is committed, or where the party is apprehended, there to be whipped; and for every other offence he shall in like manner be whipped. The constable refusing, shall be committed by the justice till he conform. *43 El. c. 7.*

Cutting corn growing.

But if he cut it at one time, and then come again at another time and take it away, it is felony. *1 Haw. 93.*

If any person shall in the night time maliciously and wilfully burn or cause to be burnt, any rick or stack of corn, he shall be guilty of felony: but to avoid judgment of death, he may make his election to be transported for seven years. And three justices (*1 Q.*) may determine the same. *22 & 23 C. 2. c. 7.*

Burning corn in the night.

But by the *9 G. c. 22.* commonly called the Black Act, which is inserted more at large in the title of that name, If any person shall set fire to any mow or stack of corn, he shall be guilty of felony without benefit of clergy. *f. 1.*

Burning by night or day.

And the hundred shall answer the damages, not exceeding 200 l. *f. 7, 8, 9, 10.*

And if any person shall apprehend, or cause to be convicted, such offender, and shall be killed, or wounded so as to lose an eye, or the use of any limb, in apprehending or endeavouring to apprehend such offender, on proof thereof at the sessions, and certificate thereof from thence, the sheriff shall pay to the person entitled the sum of 50 l. in 30 days, to be repaid to him out of the treasury. *f. 12.*

III. Ascertaining the prices of corn.

Maritime counties to be divided into 12 districts.

For the better ascertaining the prices of corn and oatmeal, by the 31 G. 3. c. 30. it is enacted, That the several maritime counties in England shall be divided into districts in the following manner:

1st. District to consist of the counties of *Essex, Kent, and Sussex*, and the city of *London*.

2d. *Suffolk and Cambridge*.

3d. *Norfolk*.

4th. *Lincoln, East and North Riding of York*, together with the town and county of *Kingston upon Hull*.

5th. *Durham and Northumberland*, and the town of *Berwick upon Tweed*.

6th. *Cumberland and Westmorland*.

7th. *Lancaster and Chester*.

8th. *Flint, Denbigh, Anglesea, Carnarvan, and Merioneth*.

9th. *Cardigan, Pembroke, Carmarthen, and Glamorgan*.

10th. *Gloucester, Somerset, and Monmouth*, and the city of *Bristol*.

11th. *Devon and Cornwall*.

12th. *Dorset and Hants*.

And that in the several counties forming the above districts, shall, for the purposes of this act, be included and considered as part thereof, all such cities, towns, or places, locally situated within the said several counties, as are counties of themselves, or as have an exempt jurisdiction, and which do not contribute to the county rate in which they are situate. *s. 31*

Sessions to appoint corn inspectors.

And the justices in sessions, or some adjournment thereof, shall appoint such person as they shall think best qualified within their respective jurisdictions (not being a miller, maltster, factor, merchant, clerk, agent, or other person buying corn for sale, or for the sale of meal, flour, malt, or bread made thereof) residing within or near each city or town hereafter nominated; except such as are counties of themselves, or have exempt jurisdiction, and which do not contribute to the county rate where situate; to collect weekly an account of the prices and quantities of corn and oatmeal, sold and delivered in such city or town; and such person shall be called *Inspector of corn returns* for such place; and the said justices shall, in the same manner, upon the death, removal, or resignation of any such inspector,

Inspector, at the next or some subsequent sessions, appoint another fit person in his place. *f. 48.*

And in such cities or towns as are counties of themselves, the mayor and the justices of the peace of such city or town, shall, at their sessions, appoint a corn inspector for such place, qualified in like manner as aforesaid.

f. 49.

And the cities and towns for which inspectors shall be appointed within each district, shall be as follows:

Places for which inspectors shall be appointed.

1st. District. See City of London, &c. (post.)

2d. Ipswich, Woodbridge, Sudbury, Hadleigh, Stowmarket, Bury St. Edmunds, Beccles, Bungoy, Lowestoft, Cambridge, Ely, and Wisbech.

3d. Norwich, Yarmouth, Lynn, Thetford, Walton, Wymondham, East Dereham, Haverhill, Holt, Aylesham, Fakenham, and Walsingham.

4th. Lincoln, Gainsborough, Stamford Bridge, Louth, Boston, Skeffington, Stamford, Spalding, York, Bridlington, Beverley, Howden, Hull, Whitby, and New Malton.

5th. Durham, Stockton, Darlington, Sunderland, Barnard Castle, Wolsingham, Belford, Hexham, Newcastle upon Tyne, Morpeth, Alnwick, and Berwick upon Tweed.

6th. Carlisle, Whitehaven, Cockermouth, Penrith, Appleby, and Burton.

7th. Liverpool, Ulverston, Lancaster, Preston, Ormskirk, Warrington, Manchester, Bolton, Chester, Nantwich, Macclesfield, and Stockport.

8th. Holywell, Mold, Denbigh, Wrexham, Tynmawr, Llangollen, Beaumaris, Llanerchymedd, Amlwch, Carnarvon, Pwllheli, Conway, Bala, Corwen, and Dolgelly.

9th. Cardigan, Lampeter, Aberystwith, Pembroke, Fishguard, Haverfordwest, Carmarthen, Llandilo, Kidwilly, Swansea, Neath, and Cowbridge.

10th. Gloucester, Cirencester, Tetbury, Stow on the Wold, Trunkbury, Taunton, Wells, Bridgewater, Frome, Wellington, Monmouth, Abergavenny, Chepstow, Pontypool, and Bristol.

11th. Exeter, Barnstaple, Plymouth, Totness, Tavistock, Kingsbridge, Truro, Bodmin, Launceston, Redruth, Huelstone, and St. Austell.

12th. Blandford, Bridport, Dorchester, Sherborne, Lyme Regis, Wareham, Winchester, Andover, Basingstoke, Fareham, Gosport, Newport, Ringwood, Southampton, and Portsmouth.

And the justices of such maritime counties, and such mayor and magistrates, may, at their respective quarter sessions or adjournment thereof, remove any such inspector, for

Inspector dying or being removed.

for misbehaviour or neglect of duty, on complaint being made thereof on oath, by one witness; or on complaint made in writing and signed by the receiver of corn returns. Provided, that in case the death or resignation of any such inspector shall happen at any time previous to the holding such sessions: two justices, or such mayor, may appoint another person in his place until the next sessions.
s. 50.

Inspector's oath. And every such inspector shall, previous to his taking upon him the office, take and subscribe before one justice of such county, city, or town, the following oath.

I A. B. do swear [or affirm], That I will at all times make due and true returns to the receiver of corn returns appointed by virtue of an act, passed in the thirty-first year of the reign of king George the third, intitled [here set forth the title of the act], of the weekly quantities and prices of corn and oatmeal at the market held at ——— according to the accounts delivered to me by the several dealers in corn and oatmeal at the said market, and that I will use my best endeavours to procure true accounts of such quantities and prices from such dealers, and in all things, to the best of my skill and judgment, conform myself, as inspector of corn returns, to the directions of the said act. s. 51.

Dealers in corn to give an account weekly to the inspector.

And all millers, maltsters, factors, merchants, clerks, agents, and other persons being dealers in corn for sale, or for the sale of meal, flour, malt, or bread made thereof, shall return to the inspector for the city or town whereat they shall buy any corn or oatmeal, an account in writing signed by their own name, of the quantity of each respective sort of corn and oatmeal by them bought and received during any week, on the first market day in the week then next ensuing, with the prices thereof, and by what measure or weight the same was bought; on pain of forfeiting for every such neglect not exceeding 10 l. nor less than 40 s. s. 52.

Dealers to make a declaration.

And every such person as aforesaid dealing in corn for sale, shall, within one calendar month from the time he shall begin to deal in corn or oatmeal in any city or town before-mentioned, make a declaration as follows:

I A. B. do hereby declare, that the returns of the quantities and prices of British corn and oatmeal, which henceforward shall be by me bought and received, shall, to the best of my knowledge and belief, be true and just, and to the best of

of my judgment, conformable to the directions of an act passed in the thirty-first year of the reign of his majesty king George the third, intituled [here set forth the title of the act].

Which declaration shall be in writing, and signed by such dealer, and shall be by him forthwith delivered to a justice for such county, city, or town, who shall certify the same so, and such certificate shall be filed by the clerk of the peace or town clerk for such place. And in case any person shall buy any corn or oatmeal for sale as aforesaid, without having made the said declaration; or shall wilfully make a false return of the quantities and prices; he shall, for every such neglect, or false return, forfeit not exceeding 10 l. nor less than 40 s. *f. 53.*

And every such inspector shall enter in a book the several accounts of the quantities and prices of corn and oatmeal so returned to him, which book shall not be made publick or shewn to any person whatsoever, unless called for by the receiver of corn returns, or by an order in writing under the hand of a justice for the place where such inspector shall reside: under the penalty of 20 l. And such inspector shall return to the receiver of corn returns, on the *Tuesday* in each week, an account of the weekly quantities and prices of the several sorts of corn and oatmeal sold and delivered in the city or town for which he is inspector, according to the returns so made to him; on pain of forfeiting for every such neglect 10 l. which account shall remain with the receiver of corn returns.

Inspector to keep a book, and make returns to the receiver.

f. 54.

And whereas it will be useful that an account should be obtained of the prices of corn and oatmeal sold in the several inland and other counties from which returns are not herein-before directed to be made, it is enacted, that the prices of each sort of corn and oatmeal shall be taken in manner herein-after directed, in the several cities and towns, within the counties herein-after named: (*viz.*)

Accounts of the prices of corn to be taken in the inland counties.

In the }
county of } *Essex; Chelmsford, Colchester, and Rufford.*
———— *Kent; Maidstone, Canterbury, and Dartford.*
———— *Sussex; Chichester, Lewes, and Rye.*
———— *Berks; Reading, Newbury, and Windsor.*
———— *Bedford; Bedford, Woburn, and Potten.*
———— *Buckingham; Aylesbury, Wycomb, and Newport Pagnell.*
———— *Derby; Derby, Chesterfield, and Ashburn.*

In

In the } HERTFORD; *Hertford, Bishops Stortford, and*
 county of } *Royston.*
 ——— HEREFORD; *Hereford, Leominster, and Ross.*
 ——— HUNTINGDON; *Huntingdon, St. Ives, and St.*
 Neots.
 ——— LEICESTER; *Leicester, Abby-de-la-Zouch, and*
 Hinckley.
 ——— MIDDLESEX; *Uxbridge, Stains, and Brentford.*
 ——— NORTHAMPTON; *Northampton, Wellingbo-*
 rough, and Peterborough.
 ——— NOTTINGHAM; *Nottingham, Newark, and*
 Mansfield.
 ——— OXFORD; *Burford, Henley, and Oxford.*
 ——— RUTLAND; *Oakham, and Uppingham.*
 ——— SALOP; *Ludlow, Shrewsbury, and Whitchurch.*
 ——— STAFFORD; *Newcastle, Stafford, and Burton*
 upon Trent.
 ——— SURRY; *Croydon, Kingston, and Riegate.*
 ——— WARWICK; *Coventry, Warwick, and Bir-*
 mingham.
 ——— WORCESTER; *Worcester, Evesham, and Kid-*
 derminster.
 ——— WILTS; *Salisbury, Devizes, and Marlborough.*
 ——— WEST RIDING OF YORK; *Leeds, Halifax, and*
 Doncaster.
 ——— BRECON; *Brecknock, and Builth.*
 ——— MONTGOMERY; *Montgomery, and Paol.*
 ——— RADNOR; *Knighton, and Presteigne.* s. 62.

And inspectors
to be appointed.

For each of which districts an inspector of corn returns shall be appointed, in the same manner, and under the same rules, regulations, and restrictions, and removeable in like manner as those appointed for the maritime counties aforesaid. s. 63.

Such inspectors
do take an oath.

Which inspector shall take the following oath before a justice, or the mayor or chief officer, in the same manner as is herein-before directed in the maritime counties:

I A. B. do swear [or affirm], That I will, at all times, make due and true returns to the receiver of corn returns appointed by virtue of an act passed in the thirty-first year of his majesty king George the third, intituled [here set forth the title of the act], of the average prices of each sort of corn and of oatmeal sold at the market held at ———; and that I will in all things, to the best of my skill and judgment, conform myself, as inspector of corn returns, to the directions of the said act. s. 64.

And

And such inspector shall enter in a book, an account of the average weekly prices of each sort of corn; and oatmeal, according to the respective measures in table D, and shall return to the receiver of corn returns on the *Tuesday* in each week, an account of the average weekly prices of the several sorts of corn and oatmeal sold in the city or town for which he is inspector; on pain of forfeiting for every neglect 10l. which account shall be lodged with the receiver of corn returns. *f. 65.*

To keep a book, and make returns.

Provided, that in case the justices at any quarter sessions shall think it necessary or expedient, that any other cities or towns should be appointed, either in the maritime counties, or those last mentioned, for taking the prices of corn and oatmeal as aforesaid, instead of those named in this act; they shall direct a representation to be made to his majesty for that purpose; such city or town so proposed and named by them, shall, upon the approbation of his majesty in council being signified to them, be deemed to be, and become a city or town for taking the prices of corn, &c. instead of any of those proposed to be omitted. *f. 67.*

Places for taking the prices of corn, &c. may be changed.

And the receiver of corn returns, shall enter all returns by him received in a book, and shall once in every week cause an abstract of the average prices computed therefrom to be published in the *Gazette*. And shall four times a year transmit a certificate to the treasurer of each county, and to the lord mayor and aldermen of *London*, and to the mayor of such cities and towns as aforesaid, of the returns which have been made, and also whether such returns have been regularly made as directed by this act. *f. 66.*

Average prices to be published in the *Gazette*, and a certificate sent to the county treasurers, &c.

And the inspectors for each county shall be paid quarterly out of the county rate; and the inspectors of every such city or town as aforesaid shall in like manner be paid quarterly from the poor rates, (the contributions from the respective parishes or townships within such city, or town, to be apportioned by the mayor, with liberty to the churchwardens and overseers to appeal to the next sessions for such city or town,) a sum not exceeding 5s. for each return from any city or town in the maritime counties, and not exceeding 2s. for each return from any city or town in the several inland or other counties last mentioned, certified by the receiver of corn returns to have been properly made; which certificates are to be made quarterly. Except where such justices or mayor shall think some larger compensation necessary, in consideration

How inspectors are to be paid.

Money paid to inspectors to be repaid by the receiver general of the customs.

tion of the great trouble to which such inspector may be subject. *f. 74.*

And the receiver of corn returns shall at the end of every year transmit to the receiver general of the customs, a certificate of the number of returns which have been properly made to him as directed by this act, and such receiver general shall, on an order from the commissioners of the customs, forthwith repay to the treasurer of every such county, and mayor of every such city or town, such sums as they have paid not exceeding the rates aforesaid; and such county treasurer shall carry the sum so received to the county rate, and such mayor shall pay the sum so received to the churchwardens and overseers in proportion to the sums each parish or township contributed. *f. 75.*

IV. Exportation and importation of corn.

Bounties to be paid on exportation.

By the 31 G. 3. c. 30. whenever the prices of middling *British* wheat, rye, barley, bigg, beer, or oats, shall appear, according to the methods by this act directed, to be *under* the prices specified in table A, there shall be paid on every of the said articles ground or unground, being of the growth or product of this kingdom, and on malt and biscuit made thereof, bounties as specified in the said table, on the exportation thereof in *British* built ships owned and navigated according to law. *f. 3.*

When not to be exported.

And whenever the prices of middling *British* wheat, rye, barley, bigg, beer, oats, pease, or beans, shall appear, according to the methods aforesaid, to be *at* or *above* the prices specified in table B, no person shall export the same, or any article made thereof, except starch as specified in the said table; on forfeiture of the same, and also 20s. for every bushel thereof, or of meal, flour, or malt, made thereof; and 12d. for every pound weight of biscuit bread made thereof; together with the vessel and furniture, which may be seized by any officer of the customs. Provided always, that if satisfactory proof be made, from the smallness of the quantity, that the same was on board without the privity of the owner or master, the vessel shall not in that case be forfeited. *f. 7, 8, 9.*

Penalty.

Exception.

Corn duly entered for exportation, and begun to be shipped.

Provided that corn or other the articles aforesaid entered outwards, and begun to be shipped, or such part thereof as shall be shipped within 20 days from the entry thereof, may be exported, though the prices should in the mean time rise to the rates at which such exportation is prohibited.

hibited. And this act shall not extend to corn or articles
aforesaid, for the sustenance of the crew of any vessel, or
live stock on board; or for victualling his majesty's ships
of war, forts, forces, or garrisons; or to prohibit the ex-
portation of beans to the *British* forts, castles, or factories
in *Africa*, or ships trading upon that coast, which have
been usually supplied with the same from *Great Britain*;
or to prohibit the carrying the same *coastwise* upon suffer-
ance; or to the quantities permitted to be exported to
certain places as set forth in table C, (for which see
the act,) bond being first given as therein specified.
s. 10, 11.

Not to extend
to corn, &c.
for the suste-
nance of the
crew, &c. or
shipped for cer-
tain places.

And upon the importation of wheat, wheat meal, or
flour, rye, barley, beer, or bigg, oats, oatmeal, pease, beans,
Indian corn, and maize, the duties to be paid shall be
regulated according to the prices of wheat, rye, barley,
beer, or bigg, pease, beans, oats, and oatmeal as set forth
in table D. And no corn ground, except wheat meal,
wheat flour, and oatmeal, nor any malt, shall be im-
ported, on forfeiture thereof with the vessel and furniture,
which may be seized by any officer of the customs.
s. 15.

Importation.
Articles not to
be imported.

And whenever, by any act passed in the parliament
of *Ireland*, wheat or other articles aforesaid are importable
into that kingdom, at the prices, and not above the du-
ties in table E, the duties on the importation from *Ire-
land* or *North America* shall be regulated according to the
prices in the said table. s. 16.

Importation
from *Ireland* and
America.

And when the same is imported as the growth of *Ire-
land* or *North America*, the master shall bring a certificate
from the officer of the port of shipping, expressing the
quantity, &c. otherwise it shall be deemed to be brought
from some other foreign country. s. 17.

Importation of
corn the growth
of *Ireland* or
America.

And the treasury shall appoint a receiver of corn returns,
who shall take the following oath, before a justice for
Middlesex; viz.

Receiver of corn
returns to be
appointed.

I A. B. do swear, That I will, to the best of my skill and
knowledge, execute the office of receiver of corn returns,
according to the directions of an act, passed in the thirty-first
year of the reign of his majesty king George the third, inti-
tled [here set forth the title of the act], and in all things
conform myself as receiver of corn returns to the provisions of
the said act. s. 77, 78.

By

Regulations for
the exportation
of corn, &c.

By the 33 G. 3. c. 65. *f. 1.* the sections 55 & 56 of 31 G. 3. c. 30. are repealed; and it is enacted, That the receiver of corn returns shall, at the end of every week, make up and compute from the returns by him received, the average price according to the respective measures in table D of each respective sort of corn and oatmeal; which returns and average prices he shall enter in a book, and shall therefrom make up and compute the average price of each respective sort of corn and oatmeal sold and delivered during such week in each district; and shall transmit to the collectors of the customs of the several ports within each such district, a certificate thereof; and every such collector shall enter the same in a book, and cause a copy thereof to be hung up in some publick place in the custom-house: and the exportation of corn and other articles aforesaid, and payment of the bounty thereon, shall be governed and regulated by such average prices until new average prices shall in like manner be made and received. *f. 2.*

Regulations for
the importation
of corn, &c.

And such receiver of corn returns shall, within seven days of the 15th *Feb.* 15th *May*, 15th *August*, and 15th *Nov.* respectively in every year, make up and compute from the six last weekly certificates by him so transmitted to the collectors of the customs, the average price of each sort of corn and oatmeal during the said six weeks in each such district, and shall also, without delay, transmit a certificate of the average prices so made up and computed as aforesaid to such collectors of the customs, who shall enter the same in a book, and cause a copy thereof to be hung up in like manner as aforesaid, from which the importation of corn, meal, and flour, and the payment of the duty thereon shall be governed and regulated, in manner aforesaid. *f. 3.*

Returns from
two thirds of
the places suf-
ficient.
Where sufficient
returns are not
made,

And returns from two thirds of the places in each district shall be sufficient for forming the average prices as aforesaid. 31 G. 3. c. 30. *f. 68.*

And in case a sufficient number of returns shall not be made from one or more of the said districts as before directed, the receiver of corn returns shall compute from the quantities and prices in the accounts returned from all the other parts of the kingdom, the average price of each sort of corn and oatmeal, and shall transmit a certificate thereof to the collectors of every such district from which sufficient returns have not been made, from which the importation and exportation within such district shall be governed, in manner as aforesaid. *f. 69.*

And by 33 G. 3. c. 65. after reciting, that doubts had arisen as to the manner in which such receiver should com-
pute

bute the said average prices; it is enacted, That such receiver of corn returns shall make up and compute at the end of every week, from the average prices of the several sorts of corn and oatmeal returned to him in the week immediately preceding, the average price of each sort of corn and oatmeal in each county; and further make up and compute at the end of every week, from the average of the county prices so ascertained, the general average price of each sort of corn and oatmeal, and shall cause the same to be published in the *Gazette* once in every week.

§. 4.

And in case a sufficient number of returns shall not be made from any district, or in case any sort of corn or oatmeal should be entirely omitted in all the returns of any district, such receiver of corn returns shall transmit a certificate of the general average price of each sort of corn or oatmeal, or of any sort which may have been omitted as aforesaid, computed as above directed, to such collectors as aforesaid, and according thereto the importation and exportation of such corn and other articles shall be regulated as aforesaid. §. 5.

V. City of London, and Kent, Essex, and Suffex.

By 31 G. 3. c. 30. within the port of *London*, and in *Kent*, *Essex*, and *Suffex*, composing the first district before mentioned, the exportation and importation of corn and other articles aforesaid, shall be regulated by the prices taken at the corn exchange in *Mark Lane*; and the proprietors thereof are to appoint a person qualified as aforesaid, to be inspector of corn returns; and on his death, removal, or resignation shall, within 28 days, appoint another in his place; and such inspector shall, within one week after he has received his appointment, deliver the same to the lord mayor or one alderman, and shall enter into bond with two sureties in 200*l.* for his faithfully fulfilling his office, and shall take the following oath:

A corn inspector to be appointed.

I A. B. do swear, That I will at all times make due and true returns to the receiver of corn returns appointed by virtue of an act, passed in the 31st year of the reign of king George the third, intituled [here set forth the title of the act], and in all things, to the best of my skill and judgment, conform myself, as inspector of corn returns, to the directions of the said act. Oath.

Vot. I.

Ll

Which

An office to be provided.

Which appointment, and a certificate of his having taken such oath, shall be inrolled at the next sessions for the city of London; and such proprietors shall provide an office for such inspector, over the door of which shall be written *Office of inspector of corn returns.* *f. 34.*

Where no inspector shall have been appointed.

And in case the said proprietors shall neglect to appoint a corn inspector within the time aforesaid, the lord mayor and aldermen, at the next or some subsequent sessions, shall appoint a corn inspector, who is to be qualified as aforesaid. *f. 35.*

How removeable.

And no such inspector shall be removeable but by the lord mayor or aldermen in sessions, and on his removal they shall signify the same to the secretary and one proprietor of the corn exchange, who shall forthwith proceed to nominate another. *f. 36.*

Being disabled.

And in case such inspector shall be disabled by sickness for one week to execute his office, the same shall be signified to the secretary of the corn exchange or one proprietor, and a deputy shall be appointed in manner aforesaid, qualified as aforesaid, during his disability, and no longer. *f. 37.*

Corn-factors to make a declaration.

And every such corn-factor shall, within one calendar month from the time he shall begin, make the following declaration :

I A. B. do hereby declare, That the returns of the quantities and prices of British corn and oatmeal, which henceforward shall be by or for me sold and delivered, shall, to the best of my knowledge and belief, contain the whole quantity, and no more, of the corn and oatmeal bona fide sold and delivered by or for me, within the period to which they shall refer, with the prices of such corn and oatmeal, and the names of the buyers respectively, and to the best of my judgment, conformable to the directions of an act passed in the 31st year of the reign of king George the third, intitled [here set forth the title of the act].

Which declaration shall be in writing and signed by him, and shall be delivered to the lord mayor, who is to grant a certificate thereof, which shall be registered with such inspector, on the penalty of 50*l.* *f. 38.*

And to make returns weekly.

And every such factor shall return on the *Wednesday* weekly to such inspector, an account in writing signed by him or his agent, of the quantities of each sort of corn and oatmeal by him sold and delivered during the week, and the prices thereof according to the measures in table D, the

the amount of every parcel, with the total quantity and value of each sort of corn and oatmeal, and by what measure or weight the same was sold, with the names of the buyers thereof; on the penalty of 10*l.* for every such neglect. *f.* 39.

And the said inspector shall enter in a book the accounts so received by him from such factors, which shall not be made publick or shewn to any person whatsoever, unless called for by the receiver of corn returns, or the lord mayor or two aldermen; on the penalty of 10*l.* *f.* 40.

Inspector to enter the accounts in a book.

And such inspector shall make up an account weekly from the returns by him received, of the aggregate quantity according to the measure in table D, and price of each sort of *British* corn and oatmeal sold and delivered during such week in *London*, and shall enter the same in a book, and compute the average prices thereof, and shall on the *Friday* in every week transmit a copy of such average prices to the receiver of corn returns, who shall enter the same in a book, and transmit a certificate thereof to the collector of the customs in *London*, and the ports in *Essex*, *Kent*, and *Sussex*; and such collectors shall proceed herein in the same manner as the collectors in the maritime counties aforesaid, for regulating the exportation of corn, &c. *f.* 41.

And to make up an account weekly, for regulating the exportation of corn, &c.

And such inspector shall, within seven days after the 15th of *February*, 15th of *May*, 15th of *August*, and 15th of *November* respectively, make up and compute upon the six last weekly returns by him received, the average quantities and prices of *British* corn and oatmeal for the said periods according to the rule aforesaid, except oats, which shall be computed from the last 12 weekly returns, and shall transmit the same to the receiver of corn returns, who shall transmit a certificate thereof to the collectors of the customs in *London* and places aforesaid, in manner aforesaid, as the rule for regulating the importation of corn and articles aforesaid. *f.* 42.

And also every six weeks for regulating the importation of corn, &c.

And the said inspector shall deliver to the lord mayor and aldermen at their next sessions, a copy of such average prices upon oath, and they shall cause the same to be published in the *Gazette* once in each of the four weeks immediately succeeding such sessions; the expence whereof shall be paid by such inspector. *f.* 43.

Average prices to be published in the *Gazette*.

And all *British* corn brought into the *Thames* eastward of *London Bridge*, which shall be sold and delivered, shall be charged with 1*d.* per last or ten quarters: And foreign corn when delivered out of any ship in the port of *London*

Factors to pay for corn brought in the *Thames*.

2d. *per* last, besides the duties aforesaid, and such inspector shall receive the same from the factor or importer thereof; who shall also deliver an account of the quantity of the said corn to such inspector, within one week after the sale and delivery thereof, together with the name of the master or commander of such ship. *f.* 44.

If not duly paid,
may be levied
by distress.

And if the said imposition of 1d. and 2d. *per* last is not duly paid, the sessions for the city of *London* may enquire into and examine such inspector, who shall declare whether any such factor or importer have neglected to pay the same, in which case, on due proof to the satisfaction of the court, the lord mayor and two aldermen may levy the same by distress. *f.* 48.

Application
thereof.

And such inspector shall yearly, at the *Christmas* and *Missummer* sessions for the city of *London*, deliver an account of the money by him received, out of which he may detain for his own use such sum as the lord mayor and aldermen shall direct, not exceeding 200l. nor less than 100l. *per annum*: And such part of the residue shall be paid over to the proprietors of the corn exchange, as shall be sufficient to repay such monies as they have expended, in providing and keeping in repair such office, &c. and the remainder, if any, shall be paid to the receiver general of the customs. *f.* 45.

The present
practice of
measuring corn
to continue.

But nothing herein shall alter the present practice of measuring corn and articles aforesaid within *London*, nor to lessen the tolls payable thereon. *f.* 84.

Penalties, how
to be recovered
and applied.

And all penalties and forfeitures by this act imposed may be recovered in the courts at *Westminster*. But penalties and forfeitures on corn factors, or dealers in corn, malt, meal, or flour for sale as aforesaid; or on any inspector of corn returns; may be recovered before two justices where such person shall reside, and if it shall appear, on due proof and examination of the matter, that such person is guilty of the offence alleged against him, they may convict such offender, and levy the penalty by distress; which shall be applied to the like purposes as other penalties against the laws of customs. And such determination shall be final to all intents and purposes. *f.* 87, 88.

Former acts to
extend to this
act.

And all acts now in force for securing the revenue of the customs, or for the regulating in importation and exportation of any goods, wares, or merchandize, shall extend to this act, unless altered thereby. *f.* 85.

VI. Obstructing the free passage of corn.

If any person shall wilfully and maliciously beat, wound, or use any other violence to any person, with intent to hinder him from buying corn in any market or other place; or shall unlawfully stop or seize upon any wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market town, or place; or shall wilfully and maliciously break, cut, or destroy any waggon, cart, or other carriage wherein any such flour or grain shall be laden, or the harness of any horse drawing the same; or shall unlawfully take off, drive away, kill, or wound any such horse; or beat or wound the driver; or shall, by cutting of the sacks or otherwise, scatter or throw abroad such wheat, flour, meal, malt, or other grain, or shall take and carry away, spoil, or damage the same, or any part thereof; he shall, on conviction (A,B) before two justices, (or in open sessions, who may summarily and finally hear and determine the same,) be sent to the gaol or house of correction (C) to be kept to hard labour, for any time not exceeding three nor less than one month. [And moreover, by 11 G. 2. c. 22. s. 1. if the same is done to prevent the *exportation* of corn, such offender shall be once publicly and openly whipped by the master of such gaol or house of correction, in such city, market town, or sea-port in or near which the offence shall be committed, on the first convenient market day, at the market cross or market place there, between the hours of eleven and two.] 11 G. 2. c. 22. s. 1. 36 G. 3. c. 9. s. 1.

Persons hindering the buying of corn or seizing the same.

And if any such person, so convicted, shall commit any of the offences aforesaid a second time, or if any person shall wilfully or maliciously pull down, throw down, or otherwise destroy any storehouse, or granary, or other place where corn shall be then kept or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, malt, or grain therefrom, or shall throw abroad or spoil the same or any part thereof; or shall unlawfully enter on board any ship or vessel, and shall wilfully and maliciously take and carry away, cast out therefrom, or otherwise spoil or damage any corn, meal, flour, malt, or grain, therein: he shall be guilty of felony, and transported for seven years. 11 G. 2. c. 22. s. 1. 36 G. 3. c. 9. s. 2.

Persons offending a second time.

And the hundred shall answer damages (not exceeding 100 l.) as in cases of robbery; the person injured giving

Hundred who answerable.

notice of the offence in two days, by himself or servant, to a constable of the hundred, or the constable of the place in or near which the fact shall be committed; and within ten days after such notice, giving in the examination on oath of himself or of his servant present at the time of the fact, or having the care of such his property, before a justice of the peace, whether he knows the persons that committed the fact, or any of them; and if he does, then entering into recognizance to prosecute. 11 G. 2. c. 22. f. 1. 36 G. 3. c. 9. f. 3, 4.

But if an offender is convicted in 12 months the hundred shall not be liable; and therefore the action must not be brought till after one year: nor shall it be commenced but within two years. 11 G. 2. c. 22. f. 7, 8. 36 G. 3. c. 9. f. 5.

Persons not to
be punished
both by this and
former acts.

Provided, that nothing herein shall abridge any law already made for the punishment of any offence herein mentioned; but no person shall be punished both by this and any former law. 36 G. 3. c. 9. f. 6.

TABLE A.
SHEWING the prices under which certain bounties are allowed on the exportation of ground or unground corn.

Wheat.	Rye.	Barley, Beer, or Bigg.	Oats.
<p>Under, per Quarter —</p> <p>£ 44</p> <p>On wheat 5 s. per quarter.</p> <p>Wheat-meal 1 s. 3 d. per hundred weight.</p> <p>Wheat-flour, and biscuit made of wheat, 1 s. 6 d. per hundred weight.</p>	<p>£ 28</p> <p>On rye 3 s. per quarter.</p> <p>Rye-meal and flour, 9 d. per hundred weight.</p>	<p>£ 22</p> <p>On barley, beer, or bigg, and on malt made thereof, 2 s. 6 d. per quarter.</p> <p>Barley-meal, beer-meal, and bigg-meal, 10 d. per hundred weight.</p>	<p>£ 14</p> <p>On oats 2 s. per quarter.</p> <p>Oatmeal 12 d. per hundred weight.</p>

Corn.

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TABLE B.

SHEWING the prices at or above which exportation of the several articles therein mentioned is prohibited.

	Wheat.	Rye, Pease, Beans.	Barley, Beer, Bigg.	Oats.
If at or above, per quarter —	s. 46	s. 30	s. 23	s. 15
Then not to export —	Wheat, or meal, flour, malt, bread, or biscuit, made of wheat.	Rye, pease, or beans, or meal, flour, bread, or biscuit, made of rye, pease, or beans.	Barley, beer, or bigg, or meal, flour, malt, bread, or biscuit, made of barley, beer, or bigg.	Oats, or meal, malt, bread, or biscuit, made of oats.

N. B. TABLE C. is shewing the quantities of corn and other articles that may be exported in one year, to certain places, for the use of the inhabitants thereof from certain ports. For which see the act.

T A B L E D.
SHEWING the prices according to which high or low duties are to be paid on importation.

	Wheat.		Rye, Peafe, Beans.		Barley, Beer, or Bigg.		Oats.		Oatmeal.	
	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
If under, per quarter	—	50	—	34	—	25	—	17	If under, per boll } of 140 lb. avoirdupoise } 16	
High duty	—	24	—	22	—	22	—	6		
If at or above, per quarter	—	50	—	34	—	25	—	17	High duty, per boll } 8	
But under, per quarter	—	54	—	37	—	27	—	18		
First low duty	—	2	—	1	—	2	—	1	If at or above, per } boll } 16	
	—	6	—	6	—	3	—	3		
If at or above, per quarter	—	54	—	37	—	27	—	18	But under, per boll } 17	
Second low duty	—	—	—	—	—	—	—	—		
	—	6	—	3	—	3	—	2	First low duty } 2	
	—	—	—	—	—	—	—	—		
	Importation of wheat-meal and flour to be governed by the price of wheat as follows : s. d. High duty per cwt. 6 6 First low duty — 1 6 Second low duty 1 0		Importation of Indian corn or maize to be governed by the price of barley as follows : s. d. High duty, per quarter — 22 0 First low duty — 1 3 Second low duty — 1 3		Importation of Indian corn or maize to be governed by the price of barley as follows : s. d. High duty, per quarter — 22 0 First low duty — 1 3 Second low duty — 1 3		Malt made of rye, peafe ground, and beans ground, prohibited.		Malt made of oats prohibited.	
	Malt made of wheat prohibited.		Rye ground, malt made of rye, peafe ground, and beans ground, prohibited.		Barley, Indian corn or maize, beer or bigg made of barley, Indian corn or maize, beer or bigg, prohibited.		Malt made of oats prohibited.		Malt made of rye, peafe ground, and beans ground, prohibited.	

Corn.

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TABLE F.
 SHEWING the prices according to which high or low duties are to take place on importation.

Wheat.	Rye, Pease, Beans.	Barley, Beer, or Bigg.	Oats.	When imported from <i>Ireland</i> , or the pro- vince of <i>Quebec</i> , or the other <i>British</i> co- lonies or plantations in <i>North America</i> :	Oatmeal.
<i>l.</i> <i>d.</i>	<i>l.</i> <i>d.</i>	<i>l.</i> <i>d.</i>	<i>l.</i> <i>d.</i>	<i>l.</i> <i>d.</i>	<i>l.</i> <i>d.</i>
— 48 0	— 32 0	— 24 0	— 16 —	If under, per boll of } 140 lb. avoirdupois }	15 —
— 24 3	— 22 —	— 22 —	6 7	For every such boll, } high duty }	8 —
— 48 —	— 32 —	— 24 —	— 16 —		—
— 52 —	— 35 —	— 26 —	— 17 —		—
— 2 6	— 2 6	— 2 3	— 1 —	If at or above, per boll But under, per boll First low duty	15 — 16 — 1 —
— 52 —	— 35 —	— 26 —	— 17 —	If at or above, per boll Second low duty	16 — — 2
— 6 —	— 3 —	— 3 —	— 2 —		—
When imported from any other foreign country :				When imported from any other foreign country :	
If under, per quarter	— 34 —	— 25 —	— 17 —	If under, per boll	16 —
High duty, per quarter	— 22 —	— 22 —	6 7	High duty, per boll	8 —
If at or above, per quarter	— 34 —	— 25 —	— 17 —		—
But under, per quarter	— 37 —	— 27 —	— 18 —	If at or above, per boll But under, per boll First low duty	16 — 17 — 1 —
First low duty	— 2 6	— 2 3	— 1 —		—
If at or above, per quarter	— 54 —	— 27 —	— 28 —	If at or above, per boll Second low duty	17 — — 6
Second low duty	— 6 —	— 3 —	— 2 —		—
When imported from any other foreign country :		Importation of <i>Indian</i> corn or maize to be			
If under, per quarter	— 50 —	— 34 —	— 17 —		
High duty, per quarter	— 24 3	— 22 —	6 7		
If at or above, per quarter	— 50 —	— 34 —	— 17 —		
But under, per quarter	— 54 —	— 37 —	— 18 —		
First low duty	— 2 6	— 2 3	— 1 —		
If at or above, per quarter	— 54 —	— 27 —	— 28 —		
Second low duty	— 6 —	— 3 —	— 2 —		

(Importation of wheat,
meal, and flour, to

be governed by the price of wheat, as follows.	When imported from <i>Ireland</i> , or the province of <i>Quebec</i> , or the other <i>British</i> colonies or plantations in <i>North America</i> :	<i>s. d.</i> High duty, per } 6 6 cwt. First low duty 1 6 Second low duty 0 2	When imported from any other foreign country:	<i>s. d.</i> High duty, per } 6 6 cwt. First low duty 1 6 Second low duty 1 0	Malt made of wheat, prohibited.
governed by the price of barley, as follows.	When imported from <i>Ireland</i> , or the province of <i>Quebec</i> , or the other <i>British</i> colonies or plantations in <i>North America</i> :	<i>s. d.</i> High duty, per } 25 0 quarter First low duty 1 3 Second low duty 0 3	When imported from any other foreign country:	<i>s. d.</i> High duty, per } 25 0 quarter First low duty 1 3 Second low duty 0 3	Barley, <i>Indian</i> corn or maize, beer or bigg, malt ground, and malt made of barley, <i>Indian</i> corn or maize, beer or bigg, prohibited.
					Rye ground, malt made of rye, pease ground, and beans ground, prohibited.

A. Warrant for a person preventing the buying or free circulation of corn.

Westmorland. { To the constable of _____ in the said county.

WHEREAS information and complaint hath been made unto us J. P. and K. P. esquires, two of his majesty's justices of the peace in and for the said county, upon the oath of A. I. of _____ in the said county, _____, that A. O. of _____ in the said county, labourer, did on the _____ day of _____ at _____ in the said county, wilfully and maliciously beat, wound, and use other violence [or as the case may be] to him the said A. I. with intent to hinder him from buying corn in the market of _____ [or as the case may be], contrary to the statute in that case made and provided: These are therefore in his majesty's name to command you forthwith to apprehend the said A. O. and to bring him before us the said justices, to answer the said complaint, and to be further dealt withal according to law. Herein fail you not. Given under our hands and seals the _____ day of _____.

B. The conviction may be made out from the preceding conviction under this head; or from the general form under title Conviction.

C. Commitment to the house of correction.

Westmorland. { To the constable of _____ in the said county, and to the keeper of the house of correction at _____ in the said county.

WHEREAS A. O. of _____ in the said county, labourer, hath this day been duly convicted before us J. P. and K. P. esquires, two of his majesty's justices of the peace in and for the said county, upon the oath of A. I. of _____ in the said county, yeoman, for that he the said A. O. on the _____ day of _____ now last past, at _____ in the said county, did wilfully and maliciously beat, wound, and use other violence to him the said A. I. with intent to hinder him from buying corn in the market of _____ [or as the case may be], contrary to the statute in that case made and provided: These are therefore to command you the said constable, to convey the said A. O. to the house of correction at _____ in the said county,

county, and to deliver him to the keeper thereof, together with this precept: And we do also hereby command you the said keeper of the said house of correction, to receive the said A. O. into your custody in the said house of correction, and him there safely to keep to hard labour, for the space of [not more than three nor less than one] months: And we do further order that you the said keeper, do publickly and openly whip the said A. O. in the said town of _____ in the said county, on the _____ day of _____ next between the hours of _____ and _____ of the same day. Herein fail you not. Given under our hands and seals the _____ day of _____.

Coroner.

CORONERS are ancient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 Haw. 42.

Concerning whom I shall shew,

- I. Who may be a coroner.
- II. How chosen.
- III. His power and duty in taking an inquisition of death.
- IV. His power and duty in other matters.
- V. His fees.
- IV. Punishment for not doing his duty.

I. Who may be a coroner.

Of ancient time this office was of great estimation; Dignity. for none could have it under the degree of a knight.

3 Ed. 1. c. 10. 4 Inst. 271.

And by the 14 Ed. 3. §. 1. c. 8. No coroner shall ^{Estate.} be chosen unless he have land in fee, sufficient in the same county, whereof he may answer to all manner of people.

II. How

II. How chosen.

To be chosen
in the county
court.

The coroner (as of ancient time the sheriffs and conservators of the peace) shall be chosen in full county, that is, in the county court, by the commons of the same county. 28 *Ed. 3. c. 6.*

And this must be in pursuance of the king's writ for that purpose, issuing out of, and returnable into the chancery; and none but freeholders have a voice at such election, for they only are suitors to the county court. 2 *Haw. 43, 44.*

County to an-
swer for him.

And being elected by the county, if he be insufficient, and not able to answer such fines and other duties in respect of his office, as he ought; the county, as his superior, shall answer for him. 2 *Inst. 175.*

Office not void
by the king's
death.

And being chosen by the county, his office continues, notwithstanding the demise of the king. 4 *Inst. 271.*

To be sworn.

And after he is chosen, he shall be sworn by the sheriff, for the due execution of his office. 2 *Hale's H. 55.*

Others not cho-
sen by the
county.

But in the statute of 28 *Ed. 3.* which enacts that they shall be chosen by the county, there is a saving to the king and other lords, who ought to make coroners, their franchises.

Chief justice.

The lord chief justice of the king's bench, by virtue of his office, is the chief coroner of *England.* 2 *H. H. 53.*

III. His power and duty in taking an inquisition of death.

Notice.

When it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner. Otherwise if the body be interred before he come, the township shall be amerced. 2 *Hale's Pl. 170.*

Burying with-
out notice.

And by *Holt Ch. J.* It is a matter indictable to bury a man that dies a violent death, before the coroner's inquest have sat upon him. 2 *Haw. Not. 8.*

Lying unburied.

And if the township shall suffer the body to lie till putrefaction, without sending for him, they shall be amerced. *Hale's Pl. 270. 2 Haw. 48.*

Precept to sum-
mon a jury.

When notice is given to the coroner, he is to issue a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in
6 such

such a place, to make an inquisition touching that matter. 4 *Ed. 1. §. 2.* 2 *H. H. 59.* Or he may send his precept to the constable of the hundred. *Wood, b. 4. c. 1.*

But the aforesaid statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty not mentioned in it, which was incident to his office before: Upon which ground it hath been holden, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns; but that it is sufficient to say, that it was taken by the oaths of lawful persons of the county; inasmuch as such inquisitions, being good before the statute, which is wholly declaratory, must needs be so still. But it seems that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn. 2 *Haw. 47.*

These are to be at least 12; and it is said, that all persons of the neighbouring towns, above the age of twelve years are bound to attend at the taking the inquisition, unless they have a reasonable excuse to the contrary. 2 *Inst. 148.* 2 *Haw. 54.*

If the constables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the constables or jurors in default shall be amerced before the judges of assize. 2 *H. H. 59.*

Default in not appearing.

The jury appearing is to be sworn and charged by the coroner to enquire, upon the view of the body, how the party came by his death. 2 *H. H. 60.*

Swearing and charge.

For he can take inquisition of death only upon view of the body, and not otherwise, therefore if the body be interred before he come, he must dig it up. And this he may do lawfully within any convenient time, as in 14 days: *Hale's Pl. 170.* 2 *Haw. 48.*

View of the body.

If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall enquire thereof. *Hale's Pl. 170. Id.*

Where the body cannot be viewed.

The jury being sworn, and the body upon view, he shall enquire upon the oaths of them, in this manner, by the statute of 4 *Ed. 1. §. 2.* called the statute *de officio coronatoris*; viz.

Form of the charge where a person is slain.

If they know where the person was slain; whether it were in any house, field, bed, tavern, or company:

Who

Who are culpable, either of the act, or of the force; and who were present, either men or women, and of what age soever they be, if they can speak, or have any discretion:

And how many soever be found culpable, they shall be taken and delivered to the sheriff, and shall be committed to the gaol:

And such as be found, and be not culpable, shall be attached until the coming of the judges of assize.

Where a person
slain is found in
the fields or
woods.

And, by the same statute, if it fortune any such man be slain, which is found in the fields, or in the woods, first it is to be enquired, whether he were slain in the same place or not:

And if he were brought and laid there, they should do so much as they can to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart.

It shall also be enquired, if the dead person were known, or else a stranger, and where he lay the night before.

Wounds.

Also, by the same statute, all wounds, ought to be viewed, the length, breadth, and deepness; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound.

Defendants' evidence.

And they must hear evidence on all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office. 2 H. H. 157.

To enquire of
the murderer's
lands and goods.

And by the aforesaid statute, if any be found culpable of the murder, the coroner shall immediately go to his house, and shall enquire what goods he hath, and what corn he hath in his grange; and if he be a freeman, they shall enquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground: and likewise of his freehold, how much it is worth yearly, over and above the service due to the lord of the fee; and the land shall remain in the king's hands, until the lords of the fee have made fine for it:

And when they have thus enquired upon every thing, they shall cause all the land, corn, and goods to be valued, in like manner as if they should be sold immediately; and thereupon they shall be delivered to the whole township, which shall be answerable before the judges for all.

Persons drown-
ed or suddenly
dead.

In like manner, by the said statute, it is to be enquired of them that be drowned, or suddenly dead, whether they were so drowned, or slain, or strangled by the
fig

high of a cord tied straight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not slain, then ought the coroner to attach the finders, and all other in the company.

He shall also enquire, whether the persons found guilty; Flight. fled; for which flight they forfeit goods and chattels. 2 *Haw.* 48, 53.

And it hath been formerly held, that if a person were slain, and upon the coroner's inquest on view of the body, it were found that such a person fled, tho' the said person were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inquest is so solemn, that it is not traversable: also when the goods are once lawfully vested in the king, by that inquest the property of them cannot be divested. But this opinion seemeth harsh and unreasonable, that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inquest taken in his absence, without either hearing him, or giving him an opportunity of defending himself. 1 *Bac. Abr. Coron. D.* 2 *Haw.* 54.

Also it is strongly holden in some books, that an inquest of self murder, found before a coroner, cannot be traversed: but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest, by being removed into the king's bench by certiorari, may be there traversed by the executor or administrator of the person deceased; or, in case the coroner's inquest find him to have been a lunatick, by the king or the lord of the manor. 1 *Bac. Abr. Coron. D.* 2 *Haw.* 54.

And if any person be slain or murdered in the day time, and the murderer escape untaken, the township shall be amerced, 3 *H.* 7. c. 1. Township amerced for an escape.

Concerning horses, boats, carts, and the like, whereby any are slain, which properly are called deodands, they also shall be valued, and delivered unto the towns as before. 4 *Ed.* 1. *st.* 2. Deodands.

All which things must be enrolled in the rolls of the coroner. 4 *Ed.* 1. *st.* 2. Coroner's rolls.

And the sheriffs shall have counter rolls with the coroner, of things belonging to their office. 3 *Ed.* 1. c. 10. Sheriff's rolls.

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But

Adjourning a-
tor.

But it is not necessary that the inquisition be taken in the very same place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48.

Burial.

Immediately upon these things being enquired, the bodies of such persons being dead, or slain, shall be buried. 4 *Ed.* 1. *B.* 2.

Certifying to the
offices.

By the 1 & 2 *P. & M. c.* 13. *f.* 5. Every coroner, upon any inquisition before him found, whereby any person shall be indicted for murder or manslaughter or as accessary before the offence committed, shall put in writing the effect of the evidence given to the jury before him, being material; and shall bind over the witnesses to the next general gaol delivery to give evidence; and shall certify the evidence, the recognizance, and the inquisition or indictment before him taken and found, at, or before the trial, on pain of being fined by the court.

By the express words of which statute, he may enquire of *accessaries before the fact*; but he cannot enquire of *accessaries after the fact*. 2 *Haw.* 48.

Persons dying
in prison.

He ought also to enquire of the death of all persons who die in prison; that it may be known, whether they died by violence, or any unreasonable hardships: for if a prisoner, by the dures of the gaoler, comes to an untimely death, it is murder in the gaoler, and the law implies malice in respect of the cruelty. 3 *Inst.* 52, 91.

And this inquest upon prisoners ought to consist of a party jury, that is, six of the prisoners (if so many there be), and six of the next vill or parish, not prisoners. *Umfreville's Coron.* 212.

Inquisition
quashed.

If the inquisition shall be quashed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquisition. *E. 5 G. K. and Saunders.* Str. 167. *M. 9 G. Case of the coroner of Wenlock.* Str. 533.

And if a coroner appear to have been corrupt in taking an inquest, it seems that a *melius inquirendum* shall go to special commissioners, who shall proceed not on view, but upon testimony; and the coroner shall have nothing to do with such inquest: but where the inquest is quashed for want of form only, he shall take a new one in like manner, as if he had taken none before. 1 *B. Abr. Coron. D.*

IV. *His power and duty in other matters.*

He ought to enquire of treasure that is found; who were the finders, and likewise who is suspected thereof; and that may well be perceived, where one liveth riotously, haunting taverns, and hath done so of long time: hereupon he may be attached for this suspicion, by four or six, or more pledges, if he may be found. 4 *Ed. 1. B. 2.* Treasure trove.

Besides his judicial place, he hath also an authority ministerial as a sheriff; namely, when there is just exception taken to the sheriff, judicial process shall be awarded to the coroner, for the execution of the king's writs; and in some special cases, the king's original writ shall be immediately directed to him. 4 *Inft. 271.* Executing process.

He is bound to be present in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood, b. 4. c. 1.* Outlawry.

He had anciently also a power in certain appeals, as of rape, and maim; and also in cases of abjuration for felony or other offences; which are now out of use. Appeals, abjuration.

And he ought to execute his office in person, and not by deputy; for he is a judicial officer. *Wood, b. 4. c. 1.* Cannot appoint a deputy.

V. *His fees.*

By the statute of 3 *H. 7. c. 1.* The coroner shall have for his fee, upon every inquisition taken upon the view of the body slain, 13 s. 4 d. of the goods and chattels of him that is the slayer and murderer, if he have any goods: and if not, he shall have for his said fee, of such amerciaments as shall fortune any township to be amerced for escape of such murderers. Fee of 13 s. 4 d.

Moreover, by the 25 *G. 2. c. 29.* For every inquisition (not taken upon view of a body dying in gaol) he shall have 20 s. and also 9 d. for every mile he shall be compelled to travel from his usual place of abode to take such inquisition; to be paid by order of the justices in sessions, out of the county rates; for which order no fee shall be paid. *f. 1.* Fee of 20 s. and also 9 d. a mile.

And for every inquisition taken on view of a body dying in prison, he shall be paid so much, not exceeding 20 s. as the justices in sessions shall allow: to be paid in like manner. *f. 2.*

Coroner.

But no coroner of the king's household, and of the verge of the king's palaces; nor any coroner of the admiralty; nor of the county palatine of *Durham*; nor of the city of *London* and borough of *Southwark*; nor any franchises belonging to the said city; nor of any city, town, or franchise, not contributing to the county rates, or within which such rates have not been usually assessed, shall be entitled to any benefit by this act; but they shall have such fees and salaries as they were allowed before this act, or as shall be allowed by the persons by whom they have been appointed. *f. 5.*

VI. His punishment for not doing his duty.

His punishment
for neglect of
duty.

Coroners concealing felonies, or not doing their duty through favour to the misdoers, shall be imprisoned a year, and fined at the king's pleasure. *3 Ed. 1. c. 9.*

And by the *3 H. 7. c. 1.* If any coroner be remiss, and make not inquisitions upon the view of the body dead, and certify the same to the gaol delivery, he shall forfeit to the king an hundred shillings.

And by the *25 G. 2. c. 29.* If any coroner, not appointed by an annual election or nomination, or whose office is not annexed to any other office, shall be convicted of extortion for taking more than his lawful fees, or of wilful neglect of his duty, or misdemeanor in his office; the court before whom he shall be convicted may adjudge him to be removed from his office; and thereupon, if he shall have been elected by the freeholders, a writ shall issue for the removing him, and the electing another in his stead; and if he hath been appointed by the lord of any liberty or franchise, or in any other manner than by the freeholders, the person entitled to nomination shall, on notice of such judgment of removal, nominate another person in his stead. *f. 6.*

The coroner's precept to summon a jury.

Westmorland. { To the constable of ——— in the said
county.

THESE are, in the name of our sovereign lord the king, to require you, immediately upon sight hereof, to summon and warn 24 good and lawful men of the four next townships to ——— in the said county, to be and appear before me A. C. gentleman, one of the coroners of the county aforesaid, at ——— afore-

— *aforesaid*, in the *said* county, on the — day of — then and there to enquire of, do, and execute all such things as on his majesty's behalf shall be lawfully given them in charge, touching the death of A. D. And be you then there to certify what you shall have done in the premisses, and further to do and execute what in behalf of our said lord the king shall be then and there enjoined you. Given under my hand and seal the — day of —.

The juror's oath on the coroner's inquest.

YOU shall diligently enquire, and true presentment make, on the behalf of our sovereign lord the king, how and in what manner A. D. (or, a person unknown, as the case is) here lying dead, came to his death; and of such other matters relating to the same as shall be lawfully required of you, according to your evidence: So help you God.

After the foreman is sworn, the rest may be sworn, three or four together, as follows:

Such oath as A. F. the foreman of this inquest bath for his part taken, you and every of you shall well and truly observe and keep on your parts respectively: So help you God.

Witnesses oath.

THE evidence which you shall give to this inquest, on the behalf of our sovereign lord the king, touching the death of A. D. shall be the truth, the whole truth, and nothing but the truth: So help you God.

Inquisition of murder.

Westmorland. **A**N inquisition indented, taken at — in the county of — *aforesaid*, the — day of — in the — year of the reign of — before me A. C. gentleman, one of the coroners of our lord the king, for the county *aforesaid*, upon the view of the body of A. D. then and there lying dead, upon the oaths of A. B. C. D. E. F. &c. good and lawful men of — *aforesaid*, and of three other of the next towns, to wit, K. L. and M. in the said county, who being sworn and charged to enquire on the part of our said lord the king, when, where, how, and after what manner, the said A. D. came to his death, do say,
M m 3 upon

upon their oath, that one A. M. late of ——— aforesaid, gentleman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the ——— day of ——— in the ——— year of ——— aforesaid, at the first hour in the night of the same day, with force and arms, at ——— in the county aforesaid, in and upon the aforesaid A. D. then and there being in the peace of God, and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault: and that the aforesaid A. M. then and there with a certain sword made of iron and steel, of the value of 5s. which he the said A. M. then and there held in his right hand, the aforesaid A. D. in and upon the left part of the belly of the said A. D. a little above the navel of the said A. D. then and there violently, feloniously, voluntarily, and of his malice forethought, stuck and pierced, and gave to the said A. D. then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace of our said lord the king, his crown and dignity.

And the said jurors further say, upon their oath aforesaid, that A. A. of ——— yeoman, and B. A. of ——— yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid, in form aforesaid committed, that is to say, on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid in the county aforesaid, at the first hour in the night of the same day, then and there comforting, abetting, and aiding the said A. M. to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of our said lord the king, his crown and dignity.

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, And the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year, and at the place first above mentioned.

A. C. coroner.

A. B.

C. D.

E. F. &c. jurors.

An inquisition where one hangs himself.

——— As above to ——— not having God before his eyes, but being seduced and moved by the instigation of the devil, at ——— aforesaid, in a certain wood at ——— aforesaid, standing and being, the said A. D. being then and there alone, with a certain hempen cord of the value of 3d. which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated: And so the jurors aforesaid, upon their oath aforesaid, say, that the said A. D. then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered; against the peace, &c.

An inquisition where one drowns himself.

——— at ——— aforesaid, in the county aforesaid, then and there being alone, in a common river there, called ——— himself voluntarily and feloniously drowned: And so the jurors aforesaid, upon their oath aforesaid, say, that the aforesaid A. D. in manner and form aforesaid, then and there himself voluntarily and feloniously as a felon of himself killed and murdered; against the peace ———

An inquisition on one drowned by accident.

——— that the said A. D. on the ——— day of ——— in the year aforesaid, at the parish and in the county aforesaid, going into the river ——— there to bathe himself, it so happened, that accidentally, casually, and by misfortune, he the said A. D. was in the water of the said river then and there suffocated and drowned; of which said suffocation and drowning he the said A. D. then and there instantly died: And so the jurors aforesaid do say, that the said A. D. in manner, and by the means aforesaid accidentally, casually, and by misfortune,

misfortune, came to his death, and not otherwise. In witness, &c.

An inquisition where one dies a natural death,

— that the said A. D. on the — day of — in the year aforesaid, at the parish and in the county aforesaid, to wit, in a certain place called — was found dead; that he had no marks of violence appearing on his body, and died by the visitation of God, in a natural way, and not otherwise. In witness, &c.

An inquisition upon one who dies in gaol.

— who say upon their oath, that the aforesaid A. D. on the day of the taking of this inquisition, being a prisoner in the gaol at — in the county aforesaid, then and there died of the visitation of God, and then and there in manner and form aforesaid came to his death, and not otherwise. In witness, &c.

An inquisition on one non compos mentis.

— who say upon their oath, that the aforesaid A. D. on the day and year aforesaid, and at the time of his death, to wit, from the — day of — to the time of his death, and at the time of his death aforesaid, was a lunatick, and a person of insane mind; and that the said A. D. being a lunatick and a person of insane mind as aforesaid, did on the — day of — come alone to a certain river, called — in the said county, and did then and there cast himself into the said river, and drowned himself in the water of the said river: And so the jurors aforesaid upon their oath aforesaid, say, that the aforesaid A. D. from the cause aforesaid, in manner and form aforesaid, came to his death, and not otherwise. In witness, &c.

An inquisition on one for cutting his throat.

— by the instigation of the devil, at — aforesaid in the county aforesaid, in and upon himself, then and there being in the peace of God and of the said lord the king, feloniously, voluntarily, and of his malice forethought, made an assault: And that the aforesaid A. D. then and there with a certain knife, of the value of one penny, which he the said A. D. then

then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought did strike, and gave to himself then and there with the knife aforesaid, upon his throat aforesaid, one mortal wound of the breadth of four inches, and the depth of one inch, of which said mortal wound the said A. D. at ——— aforesaid in the county aforesaid, languished, and languishing lived from the said ——— day of ——— in the ——— year aforesaid, to the ——— day of ——— and that the said A. D. on the ——— day of ——— aforesaid, in the ——— year aforesaid, at ——— aforesaid, in the county aforesaid, of that mortal wound died: And so the jurors aforesaid, &c.

For killing another in his own defence.

—— upon their oaths say, that A. K. late of ——— gentleman, at ——— aforesaid in the said county, on the ——— day of ——— in the ——— year of ——— in the peace of God and of our said lord the king then being, A. M. late of ——— in the county of ——— at the hour of ——— in the afternoon of the same day, did come, and upon him the said A. K. then and there of his malice forethought did make an assault, and him the said A. K. did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one W. H. in ——— aforesaid to a certain place called ——— in the county aforesaid, and the said A. K., seeing that the said A. M. was so maliciously disposed, to a certain wall in the said place, called ——— did flee, and from thence for fear of death could not escape, and so the said A. K. himself, in preservation of his life, against the said A. M. continued to defend, and in his own defence him the said A. K. upon the right part of the breast of him the said A. M. with a certain sword of the price of one shilling, which the said A. K. then and there held in his right hand, did strike, then and there giving to the said A. M. one mortal wound, of the breadth of one inch and of the depth of three inches, of which said mortal wound the said A. M. at ——— aforesaid in the county aforesaid languished, and languishing lived from the said ——— day of ——— to the ——— day of ——— from thence next ensuing, and that the said A. M. on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid in the said county, of that mortal wound died; and so the said A. K. did then and there kill him the said A. M. in his own defence.

An inquisition where the murderer is unknown.

—— The same as before, only say, —— *that a certain person unknown, &c. and add —— And the said jurors upon their oath aforesaid further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did flee away; against the peace, &c.*

Costs.

Costs to be granted and allowed on indictments and presentments. See *Certiorari*.

Justices may
award costs.

BY the 18 G. 3. c. 19. Whereas by the laws now in being, justices of the peace are not sufficiently authorised, on complaints that come before them out of sessions, to award costs against either the person complaining, or the person against whom the complaint is made; it is therefore enacted, that where any complaint shall be made before any justice or justices, and a warrant or summons shall issue in consequence thereof, it shall be lawful for such justice, who shall have heard and determined the matter of the complaint, to award (A) such costs to be paid by either party, and in manner and form as to him shall seem meet, to the party injured: And if the person so ordered by the justice shall not forthwith pay, or give security for the same to the satisfaction of the justice; the same shall be levied by distress (B): And if goods and chattels of such person cannot be found (C), the justice shall commit him (D) to the house of correction for the place where such person shall reside, to be kept to hard labour not exceeding one month, nor less than ten days, or until such sum, together with the expences attending the commitment, be first paid. *s. 1.*

Except where
the penalty
amounts to 5*l.*
or upwards.

Provided that, upon the conviction of any person upon a penal statute, where the penalty shall amount to or exceed the sum of 5*l.* the said costs shall be deducted by the justice, according to his discretion, out of the penalty, so that the said deduction shall not exceed one fifth part of the penalty;

penalty; and the remainder of the penalty shall be paid to or divided among the person or persons who would have been entitled to the whole of the penalty, if this act had not been made. *s. 2.*

And the justices in sessions from time to time may lay down or alter such rules and regulations concerning costs or charges to be allowed to any person by virtue of this act, as to them shall seem just: which rules and regulations, having received the approbation and signature of one or more of the judges of assize, shall be binding, and not otherwise, on all persons whatsoever. *s. 9.*

The following forms are inserted in the act itself:

A. Form of awarding costs.

County or borough } *I. A. J. one of his majesty's justices of the peace*
of _____ } *in and for the _____ aforesaid, in pursuance of*
to wit. } *an act made in the eighteenth year of his majesty*
king George the third, intituled, An act for
the payment of costs to parties, on complaints deter-
mined before justices of the peace, out of sessions; for the
payment of the charges of constables in certain cases;
and for the more effectual payment of charges to witnesses
and prosecutors of any larceny or other felony; *on the*
complaint of _____ [here state the names of the parties
and the offence generally, and the date] against _____
for _____ which said complaint was heard and determined by
me on the _____ day of _____ Do award the following costs to be
paid by _____ videlicet [here state the costs]. Given under
my hand and seal this _____ day of _____ in the year of
our Lord _____.

B. Form of warrant of distress and sale.

_____ } To the constable of _____ and to all other
to wit. } his majesty's constables in and for _____ in
_____ aforesaid.

Whereas I J. P. esquire, one of his majesty's justices of the
peace in and for the _____ aforesaid, in pursuance of an act made
in the eighteenth year of his majesty king George the third, in-
tituled, An act for the payment of costs to parties, on
complaints determined before justices of the peace out of
sessions; for the payment of the charges of constables in cer-
tain cases; and for the more effectual payment of charges to
witnesses

Costs.

witnesses and prosecutors of any larceny or other felony, have awarded, on the — day of — now last past, on the complaint of — against — for — the following costs to be paid by — videlicet [here state the sum]: And whereas the said — being ordered by me the said justice to pay such sum as aforesaid, hath not paid down or given security for the same to the satisfaction of me the said justice; These are therefore to command you, and each and every of you, to levy the said sum of — by distress and sale of the goods and chattels of the said — and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of within — days, unless the said sum of — for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid; and you are hereby also commanded to certify unto me what you shall have done by virtue of this my warrant. Given under my hand and seal as — the — day of — in the year of our Lord —.

C. Constable's return thereon, for want of distress,

— } I — constable of — do hereby certify
to wit. } to — justice of the peace of — that I have
made diligent search for, but do not know, nor can
find any goods and chattels of — by distress and sale where-
of I may levy the sum of — pursuant to his warrant for
that purpose dated the — day of —. Given under my
hand this — of — in —.

D. Commitment thereupon to the house of correction.

— } To the constable of — and also to the
to wit. } keeper of the house of correction at —.

Whereas, in pursuance of an act made in the eighteenth year of his majesty king George the third, intituled, An act for the payment of costs to parties, on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony, I J. P. esquire, one of his majesty's justices of the peace in and for the said — did issue my warrant of distress and sale, directed to — of — constable of the said — of — ordering the said constable to levy the sum of — of the goods and chattels of the said — in manner and form as therein is mentioned:
And

And whereas it appears to me by the return of ——— constable of ——— dated the ——— day of ——— that he hath made diligent search, but doth not know of nor can find any goods and chattels of the said ——— by distress and sale whereof the said sum of ——— may be levied pursuant to the said warrant: These are therefore to command you the said constable of ——— to apprehend the said ——— and convey the said ——— to the said house of correction at ——— and to deliver the said ——— there to the said keeper of the said house of correction: And these are also to command you the said keeper of the said house of correction, to receive the said ——— into the said house of correction, and there to keep to hard labour for the space of ——— from the date hereof, or until such sum of ——— together with the expences attending the commitment of the said ——— to the said house of correction, be first paid, or until the said ——— be discharged by due course of law. Given under my hand and seal at ——— the ——— day of ———.

The costs and charges of prosecutors and witnesses in cases of felony are treated of under the title *Felony*.

Cottages.

COTTAGE (*Sax. Cote*) is a little house for habitation, without any land belonging to it. By the 31 *El. c. 7.* cottages were prohibited to be erected without laying at least four acres of land to the same, and divers other restrictions were thereby enjoined; but the same was repealed by the 15 *G. 3. c. 32.* setting forth, that the said statute of 31 *El.* had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population, and in divers other respects was inconvenient to the labouring part of the nation in general.

County court.

ANCIENTLY, the *comites*, *count*, or *earls*, had County. the government of the counties; and afterwards the *vicecomites* or *sheriffs*. And the *county* seemeth to be nothing else but the district of the *comes* or *count*. *Shire* is a *Saxon* word, from *seyran*, to share or divide, for that the

the shires and counties are divided by certain metes and bounds from each other. And the *sheriff*, in Saxon *scyre-gerefa*, is the *reeve*, *grave*, or governor of the *shire*; where- in he hath great power, being therein the chief officer under the king.

County court.

The sheriff holdeth in his county two courts; the *coram* and the *county court*: The *coram* is the king's court of record for criminal causes, and for redressing of common grievances within the county; the *county court* is not a court of record, but only a court baron, for civil causes, and this is the court of the sheriff himself.

When to be holden.

By the 2^d & 3^d Ed. 6. c. 25. No county court shall be longer deferred than one month from court to court, so that the county court shall be kept every month, and not otherwise.

And this is to be accounted 28 days to the month, and not according to the month of the calendar. 2 *Inst.* 71.

Where to be kept.

It may be kept at any place within the county, unless restrained by statute. *Wood, b. 4. c. 1.*

How far the sheriff is judge.

The suitors, that is, the freeholders, are the judges in this court; except that in re-disseisin, by the statute of *Merton*, the sheriff is judge. And by the statutes concerning parliamentary elections, he is judge at the election of knights; for he must make a true return at his peril. *Barl. County Court.*

Of what sum this court hath cognizance.

This court shall hold pleas betwixt party and party, where the debt or damage is under 40s. 4 *Inst.* 266.

But in a *replevin*, the sum may be above 40s. 4 *Inst.* 266.

Of what offences this court hath cognizance.

Also it hath not cognizance of trespasss *vi et armis*, because a fine is thereby due to the king, which it cannot impose. 4 *Inst.* 266.

One plaint for one trespass or contract.

And by the 11 *H. 7. c. 15.* No plaint shall be entered in the county court, but where the plaintiff or his attorney is present; and the plaintiff shall find pledges to pursue his plaint; and he shall have but one plaint for one trespass or contract; on pain of 40s. half to the king, and half to the prosecutor. And one justice may examine the sheriff, or other officer making default; and shall, within a quarter of a year, certify the examination into the exchequer.

But as to the pledges above mentioned, they are now disused in this court; and were formerly used only in cases where the plaintiff lived out of the county. *Grunt. 11. Read. County C.*

But

But by virtue of a writ of *justicies*, the court may hold plea of trespass *vi & armis*, and of any sum, or of all actions personal above 40s. For this writ is in the nature of a commission to the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had in the courts at *Westminster*. 4 *Inst.* 266.

Writ of justicies.

By the 12 G. 2. c. 13. s. 7. If any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the county court, who shall not be admitted attorney, or solicitor according to the act of 2 G. 2. c. 23. he shall forfeit 20 l. with costs, to him who shall sue in any court of record.

Who shall act as attorney in this court.

The plaintiff in this court first takes out a summons, returnable at the next county court; and if the defendant do not appear, an attachment or *distingas* is to be made out: but if the defendant appears, the plaintiff is to file his declaration, shewing his cause of action, or matter of complaint, in what manner the action accrued, at what time and place the wrong was done, and the damage he hath sustained. *Greenw.* 11. *Read.* County C.

Summons.

If the defendant doth appear, and the next court after gives a rule to declare, and the plaintiff doth not file his declaration within the time, he may be nonsuited. *Id.*

Declaration.

When the plaintiff hath declared, he must continue his suit from court day to court day, otherwise the defendant may take advantage of it; and this is called a continuance, being an adjourning of the suit from time to time, to keep it on foot. *Id.*

Continuance.

The rule, or *dies datus*, is when farther day is given to the plaintiff to declare, or to the defendant to plead; and the time given is usually to the next court day, but upon occasion may be enlarged. *Id.*

Dies datus.

The next court after filing the declaration, and impanelance given, the defendant is to be put in his answer or plea, and if the plaintiff join issue, they may proceed to trial the next court day, if they proceed not farther by replication, rejoinder, surrejoinder, and the like. *Id.*

Answer.

But if freehold is pleaded by the defendant, this court can proceed no further, for freehold shall never be tried without writ; therefore the cause must be removed; as when a defendant avoweth for damage feasant, and the plaintiff justifieth by reason of common of pasture. *Wood*, b. 4. c. 1.

Plea of freehold.

Where a verdict is given for the plaintiff, and judgment entered thereupon, a *fieri facias* may be awarded against

Judgment and distress.

against the defendant's goods, which may be taken by virtue thereof, and appraised and sold, to satisfy the plaintiff; but if the defendant hath no goods whereupon to levy, the plaintiff remains without remedy in this court, for it being no court of record, no *capias* lies there; but an action may be brought at common law upon the judgment entered. *Greenw. 22. Read. County C.*

Removal by
recordare.

Causes are removed out of this court, by a writ of *recordare*, which issues out of the chancery, directed to the sheriff, commanding him to send the plaintiff that is before him in his county court (without writ of *justicies*) into the court of king's bench, or common pleas, to the end the cause may be there determined. And the sheriff is hereupon to summon the other party to be in that court (into which the plaintiff is to be sent) at a day certain. And of all this he is to make certificate under his own seal, and the seals of four suitors of the same court. *Id.*

Removal by
pone.

Causes are also removed by *pone*, which differs in nothing from a *recordare*, but that it removes such suits as are before the sheriff by writ of *justicies*, and a *recordare* is to remove the suit that is by plaintiff only, without writ. *Id.*

Removal after
discontinuance.

And altho' the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaintiff into the common pleas or king's bench, and it shall be good, and he shall declare upon the same. *Id.*

Outlawry pro-
nounced.

In this court, after the *quinto taxatus*, the coroner gives judgment of outlawry. 4 *Inst.* 266.

Hundred court.

Out of the county court is derived the hundred court, for the ease of the subjects, and it hath like jurisdiction as the county court, and may be held every three weeks. 2 *Inst.* 71.

County hall. See Shire hall.

County rate.

Several rates
thrown into one
general county
rate.

THE several rates hereafter following, in order to avoid the inconveniences of separate collections, shall for the future be levied and raised by one general county rate.

That is to say,

(1) For repairing county bridges, and highways thereto adjoining,

County rate.

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adjoining, and salaries for the surveyors of bridges; as directed by the 22 *H. 8. c. 5.* and 1 *An. B. 1. c. 18.*

(2) For building, enlarging, and repairing county gaols; by 11 & 12 *W. c. 19.* & 24 *G. 3. sess. 2. c. 54.*

(3) For repairing shire halls; by the 9 *G. 3. c. 20.*

(4) For building, repairing, and fitting up houses of correction, and employing the persons sent thither by the 17 *G. 2. c. 5. f. 33.*—22 *G. 3. c. 64. f. 5.*—24 *G. 3. sess. 2. c. 55. f. 2, 3, 4.*

(5) For the matter of the house of correction his salary, and relieving the weak and sick in his custody; by the 7 *J. c. 4.*

(6) For relief of the prisoners in the king's bench and marshallsea prisons; and of poor hospitals in the county, and of those that shall sustain losses by fire, water, the sea, or other casualties, and other charitable purposes for relief of the poor, as the justices in sessions shall think fit; by the 43 *El. c. 2. f. 15.*

(7) For relief of prisoners in the county gaol; by the 14 *El. c. 5.*

(8) For the preservation of the health of prisoners; by the 14 *G. 3. c. 59.*

(9) For the chaplain's salary of the county gaol; by the 13 *G. 3. c. 58.*

(10) For setting prisoners on work; by the 19 *G. 2. c. 4.*

(11) The treasurer's salary; by the 12 *G. 2. c. 29.*

(12) Salary of persons making returns of the prices of corn; by the 10 *G. 3. c. 39.*

(13) Charges attending the removal of any of the said general county rates by *certiorari*; by the 12 *G. 2. c. 29.*

(14) Money for purchasing lands at the ends of county bridges; by the 14 *G. 2. c. 33.*

(15) Charges of apprehending, conveying, and maintaining rogues and vagabonds; by the 17 *G. 2. c. 5.*

(16) Charges of the soldiers carriages, over and above the officers pay for the same, by the several yearly acts against mutiny and desertion, and by the militia act of the 26 *G. 3. c. 107.*

(17) The coroner's fee of 9d. a mile for travelling to take an inquisition, and 20s. for taking it; by the 25 *G. 2. c. 29.*

(18) Charges of carrying persons to the gaol, or house of correction; by the 27 *G. 2. c. 3.*

County rate.

(19) The gaoler's fees for persons acquitted of felony, or discharged by proclamation; by the 14 G. 3. c. 20.

(20) Charges of prosecuting and convicting felons; by the 25 G. 2. c. 36. 27 G. 2. c. 3. 14 G. 3. c. 20. and 18 G. 3. c. 19.

(21) Charges of prosecuting and convicting persons plundering shipwrecked goods; by the 26 G. 2. c. 19.

(22) Charges of bringing insolvent debtors to the assizes, in order to their discharge, if themselves are not able to pay; by the 32 G. 2. c. 28.

(23) The charges of transporting felons, or conveying them to the places of labour and confinement; by the 6 G. c. 23. and 19 G. 3. c. 74.

(24) Charges of carrying parish apprentices, bound to the sea-service, to the port to which the master belongeth; by the 2 & 3 An. c. 6.

Sessions to lay
the rate.

And that the same may be collected with as much ease, and as little expence as possible, the justices at their general or quarter sessions, or the greater part of them, shall have power to make one general rate to answer all the purposes aforesaid. 12 G. 2. c. 29. s. 1.

Which rate shall be assessed in such proportions in every parish or place, as any of the rates by the said several former acts have been usually assessed. Id.

By which last words reference being made to the former acts, as to the manner of proportioning the rate, it is proper to insert here, how the case stands upon the said former act, as to such laying of the assessments; and it is thus:

(1) By the above mentioned act of the 22 H. 8. (in regard to bridges) the justices were to rate every inhabitant within their jurisdiction, in such reasonable sum, as they should think convenient. And by the 1 An. s. 1. c. 18. Every town, parish, or place was to be assessed as they usually had been assessed towards the repair of bridges.

(2) By the 14 El. c. 5. (for relief of prisoners) the justices were to rate every parish at such reasonable sums as they should think convenient.

(3) By the 44 El. c. 2. (for hospitals and the marshalsea) the same was to be ratably assessed upon every parish.

(4) By the 7 J. c. 4. (for the master of the house of correction his salary) the same was to be rated, as for hospitals and the marshalsea, by the 43 El. c. 2.

(5) By the 19 C. 2. c. 4. (for setting prisoners on work) to be raised as other county charges.

(6) By

(6) By the 11 & 12 W. c. 19. (for repairing gaols) to be assessed by the justices in equal proportions, on every hundred, ward, or other division.

(7) And for *vagrants* (by the 12 Ann. now repealed) the money was to be raised as for bridges and gaols.

So that upon the whole here seems to be intended an equal; proportionable rate, upon every division.

H. 22 G. 3. R. v. Inhabitants of St. Paul Covent Garden. This was an appeal against the general county rate made at the quarter sessions for *Middlesex*; which rate was confirmed at the next general sessions, and the following case stated.—That the parish of *St. Paul Covent Garden* in the county of *Middlesex*, was assessed 69l. 5s. 7½d. although the annual rents or value of the lands and tenements therein assessed to the poor's rate do not amount to 22,000l.; and that the parish of *St. Mary-le-bone* in the said county, was assessed to the same county rate 7l. 5s. 10d. only, although the annual rents, or value of the lands and tenements in that parish, charged with the poor's rate, amounted to 140,000l. or thereabouts; wherefore the petitioners conceived the said county rate to be unequal.— Upon hearing the appeal, it appeared to the court, that the allegations contained in the said petition and appeal were true; but the court conceiving they were not authorised by 12 G. 2. or any other law, to vary the proportions of the county rate, as it hath continued in its present form since the year 1739, did therefore dismiss the said appeal.— After hearing counsel on both sides, *L. Mansfield* said, There is great hardship in this case; but the point is settled by the authority in *Parker's Reports* 74, and we can give no relief. The divisions of the land-tax were settled in 1694. By the increase of the metropolis it happened, that a great quantity of the land in *Westminster* has since been built upon; but the act having laid the tax upon the division, the division is no further liable than before. In this case to be sure the subject is different, but the reason is the same in both. By this act, county rates are to be collected in the same manner as rates have been usually collected in the several districts; upon parishes *eo nomine*, and not upon individuals. We have no authority to alter this proportion, notwithstanding change of circumstances, and though convinced that the equity of the case is with the appellants. *Cal. Caf. 158.*

Proportions in the several parishes cannot be altered.

And where any person, liberty, division, or place hath actually contributed, or is liable to pay, only to one or

Place exempted from part of the rate.

County rate.

more of, and not to all the rates hereby intended to be raised and thrown into one general rate; the justices at their general or quarter sessions may order and ascertain what proportion thereof shall be assessed on, and paid by such person, liberty, division, or place. 12 G. 2. c. 29. s. 5.

As for instance, where by the statute 22 H. 8. c. 5. towns corporate are charged for the repairing of bridges within their respective liberties; and the counties, for the bridges out of such liberties; in such case, a town corporate ought not to be charged towards the bridges in the county at large; and consequently ought to have an abatement in the rate charged upon them, in such proportion as the expence of bridges is to the whole expence of the several articles charged upon the said general county rate: as if the expence of bridges be a tenth part of the whole expence chargeable upon the county rate, then such town corporate shall have an abatement of one shilling for every ten, which it would otherwise be charged with in such rate.

Places exempted from the whole rate.

And by the 13 G. 2. c. 18. s. 7. Where any liberties or franchises have commissions within themselves, and are not subject to the county justices, and do not, nor did before the 12 G. 2. contribute to the county rates; the justices within such liberties may exercise the same powers within their liberties, as justices in their counties.

High constable to make demand.

Which said rates the high constable shall, at such times as the said justices by their order in sessions shall direct, demand of the churchwardens and overseers; which demand shall be made in writing (A), and given to them or any of them, or left at their dwelling houses, or affixed on the church doors by the said high constables. 12 G. 2. c. 29. s. 2.

Overseers to pay.

Whereupon the said churchwardens and overseers shall, in 30 days after such demand made, of the money collected for relief of the poor, pay the sums so assessed on each parish or place. 12 G. 2. c. 29. s. 2.

To be levied by distress.

And if the churchwardens or overseers, or any of them, shall neglect or refuse so to pay; the high constable shall levy the same by distress and sale of the goods of such churchwardens or overseers so refusing or neglecting, by warrant of two or more justices residing in or near such parish or place. 12 G. 2. c. 29. s. 2.

And

County rate.

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And the receipt of such high constable shall be a full discharge to the churchwardens and overseers, or other person paying the same. 12 G. 2. c. 29. s. 2.

High constable's receipt.

Where there is no poor rate, the justices, in their general or quarter sessions, shall by their order direct the sum assessed on such parish, township, or place, to be rated and levied by the petty constable, or other peace officer, as money for relief of the poor is by law to be rated or levied: Which sum so rated and levied shall be paid by him to the high constable, and shall be demanded of, paid by, or levied on such petty constable, in the same manner as before of the churchwardens and overseers. And if any petty constable shall pay such sum before he hath collected it, he may afterwards rate and levy the same, or may be allowed and reimbursed the same, out of any constable's or other rate, which the justices in their sessions shall order and direct. 12 G. 2. c. 29. s. 3.

Case where there is no poor rate.

As money for relief of the poor is to be rated or levied] That is to say, by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes, coal mines, or saleable underwoods. 43 El. c. 2. s. 1.

And whereas it will be inconvenient to many towns, parishes, and places, in the counties of York, Derby, Durham, Lancaster, Chester, W. Shropshire, Cumberland, and Northumberland, that the said rates shall be paid out of the poor rate; the justices at the general or quarter sessions, if they shall think convenient, may order the sum assessed on any such town, parish, or place, to be paid by and levied on the petty constable (B) in such manner as is above directed, in cases where no rate is made for the poor. 12 G. 2. c. 29. s. 4.

Northern counties.

If they shall think convenient] By which words the justices in those counties may order the rate to be paid by either of the two methods before mentioned, according to their discretions; that is to say, either by the churchwardens and overseers out of the poor rate; or by the petty constables by an assessment after the manner of the poor rate.

The said high constables, at or before the next sessions respectively after they have received the money, shall pay the same to the treasurer; and the money so paid shall be deemed the publick stock. 12 G. 2. c. 29. s. 6.

High constable to pay to the treasurer.

And the treasurer's receipt shall be a sufficient discharge to the high constable. s. 9.

Treasurer's receipt.

And the said high constables shall deliver in a true account on oath (if required) of the money by them received, before the said justices at their general or quarter sessions:

High constable to account.

County rate.

stions: and if any such high constable shall neglect or refuse to demand or levy as aforesaid, or to account, the said justices at their general or quarter sessions may commit him to the common goal, until he shall have caused such rates to be demanded and levied, and shall have rendered a true account. And if it shall appear by such account, that any sum is remaining in his hands, and he shall not pay over the same to the treasurer, they may commit him till he pay the same. *s. 8.*

Petty constables
and others to
account.

And the justices, at their general or quarter sessions, may oblige by their order the petty constables, or any other person empowered to levy, collect, or receive any sum for the purposes aforesaid, and who have any sum in their hands, to account and pay over the same, in like manner as the high constables. *s. 17.*

Treasurer's dis-
bursements.

And the treasurer shall pay so much of the money in his hands to such persons, as the justices in sessions shall by their order from time to time appoint, for the uses and purposes of the said above mentioned acts, and for any other uses and purposes to which the public stock of any county, city, division, or liberty, is or shall be applicable. *s. 6.*

And for any other uses and purposes to which the public stock is applicable. L. 32-G. 3. c. v. Inhabitants of Essex. The sessions had ordered money to be advanced by the treasurer to defend the county against a fine of 500 l. imposed on them by *L. Loughborough* at the assizes for not repairing the county goal, and which had been estimated in the exchequer. On being removed by *certiorari*, it was objected, that the magistrates could apply the public money to such purposes only as are specifically provided for by act of parliament, or sanctioned by long usage. But the court held, that the order was good, for where a rate is imposed on a county, and where costs necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expences out of the county stock. And *Buller J.* said, in his opinion, the true construction of the act is, that the necessary expences of every thing relating to the subjects therein mentioned, must be born by the county, and paid out of the county stock. If it were otherwise, the justice magistrates of a county would be put in a petitious situation in a variety of cases that might happen. *Dunf. and East, 4 V. 591.*

Treasurer's ac-
count.

And the treasurer shall keep a book of entries, of the sums by him received and paid; and shall deliver in a true account,

County rate.

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account, on oath if required, of his receipts and disbursements, to the justices at every general or quarter sessions; and also the proper vouchers for the same, to be kept amongst the records of the sessions: *f. 7, 8.*

And the discharge of the said justices, by their order at Sessions order a their general or quarter sessions, shall be a sufficient discharge to the discharge to the treasurer. *f. 9.*

And no new rate shall be made, until it appear by the New rate when treasurer's accounts, or otherwise, that three fourths of the to be made. money collected have been expended for the purposes aforesaid. *f. 10.*

If the churchwardens and overseers of any parish or Appeal, place, shall think such parish or place is over-rated, they may appeal to the next general or quarter sessions, against such part of the rate only as may affect such parishes or places; but such rate, upon the appeal, shall not be quashed in regard to any other parishes or places. *f. 11.*

No writ *certiorari* to remove any rates, or any orders or other proceedings of the sessions touching such rates, shall be granted but upon motion the first week of the next term, after the time for appealing from such rates or orders is expired; and on making it appear to the court by affidavit or otherwise, that the merits of the question on such appeal or orders, will by such removal come properly in judgment. And no such *certiorari* shall be allowed, until sufficient security be given to the treasurer, in the sum of 100*l.* to prosecute the *certiorari* with effect, and to pay the cost if the rates or orders shall be confirmed. Nor shall any such rates, orders, or proceedings be quashed for want of form only. *f. 12.*

And no action shall be commenced against any person who shall have collected or received any money on any rate which shall be quashed on a *certiorari* or otherwise, for any money collected or received on such rate before the *certiorari* was brought; but the persons who have paid on such rate more than they ought to have paid, shall be repaid, or have the same allowed in the next rate. *f. 13.*

A. High constable's warrant to levy the rate.

Westmorland. } To the churchwardens and overseers of
Kendal Ward. } the poor of the township [or parish] of
_____ in the said county.

BY virtue of an order of his majesty's justices of the peace in and for the said county, in their general quarter sessions assembled,
N. 4.

County rate.

asssembled, you are hereby required in thirty days time from your receipt of this precept, or otherwise having had due notice thereof, to pay to me, out of the money by you collected or to be collected for the relief of the poor, the sum of — being the proportion of your said township [or parish] for and towards the general county rate, for the repairing of bridges; repairing of the gaol, and for the relief of prisoners therein; and for the relief of the prisoners in the king's bench and marshalsea prisons; repairing the shire hall; repairing and furnishing the house of correction, with the salary of the keeper thereof; the treasurer's salary; the coroner's fees; the charges concerning vagrants, soldiers carriages, convicting and transporting felons, and other county charges. And herein you are not to fail, on the peril that shall ensue thereof. Given under my hand the — day of —.

John Bracken, High constable.

B. Or, in the northern counties above mentioned, the justices, if they think proper, instead of ordering the money to be paid by the churchwardens and overseers, may order it to be paid by the petty constables; and then the high constable's precept to the petty constables may be thus:

Westmorland. { To the constable of — in the said
Kendal Ward. { county.

BY virtue of an order from his majesty's justices of the peace in and for the said county, in their general quarter sessions assembled, you are hereby required to raise the sum of — within your constablewick, for which you are to make an equal rate within your said constablewick, and to levy the same, in such manner as money for the relief of the poor is by law to be rated or levied: Which said sum you are to pay unto me, in thirty days time from your receipt of this precept, or otherwise having had due notice thereof; the same being the proportion of your said constablewick, for and towards the general county rate, for the repairing of bridges —.

And so repeat the several particulars as in the last precedent; and that for this reason, that the people may know what it is they pay their money for.

Customs.

THE laws relating to the customs, so far as justices of the peace, constables, and other such officers, are concerned therein, being considerably connected with the laws of excise, it is thought proper to refer this subject to the title *Excise*, where the whole will be more clearly comprehended under one view.

Custos rotulorum.

THE *custos rotulorum* is he that hath the keeping of the rolls or records of the sessions. He is always a justice of the peace and *quorum* in the county where he hath his office. He is a man, for the most part especially picked out either for wisdom, countenance, or credit. He is the principal civil officer in the county, as the *lord lieutenant* is the chief in *military* command. 4 *Black Com.* 272.

By the 37 *H. 8. c. 1.* (which was altered by the 3 & 4 *Ed. 6. c. 1.* but restored by 1 *W. c. 21.*) No person shall be appointed to the office of *custos rotulorum*, but such as shall have a bill signed with the king's hand for the same; which bill signed shall be a sufficient warrant to the lord chancellor to make a commission, assigning and authorizing thereby the same person to be *custos rotulorum*, until the king hath by another bill with his own hand appointed one other person to have the same office, by himself, or his sufficient deputy, learned in the laws, and meet and able to supply the said office.

In pursuance whereof, the last clause in the commission of the peace is generally to this effect: "Lastly, we have assigned you the afore said ——— keeper of the rolls of our peace in our said county, and therefore you shall cause to be brought before you and your said fellows, at the days and places afore said, the writs, precepts, processes, and indictments afore said, that they may be inspected, and by a due course determined, as is afore said."

The *custos rotulorum*, by virtue of his office, having the custody of the rolls of sessions, ought to attend there by himself

Custos rotulorum.

himself or his deputy, who is the clerk of the peace, *Grand Cir.* 34.

Cyder. See *Cyrist*.

Debtors.

HOW prisoners for debt shall be demeaned. See title *Goal*.

Insolvent debtors brought to the assizes, in order to be discharged, shall pay for their bringing thither, not exceeding 12 d. a mile; and if they are not able to pay, then the same shall be paid by the treasurer, out of the county stock. 32 G. 2. c. 28. s. 15.

Deer. See *Game*.

Defamation. See *Slander*.

Demurrer.

A *Demurrer* (from *demorari*) signifies an *objection* in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood. b. 4. c. 5.*

In criminal cases not capital, if the defendant demurs to an indictment, the court will not give judgment against him to answer over, but final judgment. 2 *How.* 374.

Deodand.

What it is.

DEODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 2 *Inst.* 57.

This

This, altho' it be not properly homicide, nor punishable as a crime, yet it is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder; and the unhappy instrument or occasion of such death is called a deodand (*deodandum*,) and forfeited to the king, and was anciently paid into the hands of the king's almoner, to be applied to pious uses for the soul of the deceased. Also all such weapons, whereby one man kills another, are forfeited, 3 *Inst.* 57. 1 *Haw.* 66. *Foss.* 265.

This forfeiture is still part of the casual revenue of the crown, unless where lords of franchises are entitled to it by grant. For no man can prescribe to it; or to the goods of self-murderers or other felons, or of out-laws, happening within his royalty. *Foss.* 265.

It seems clearly settled, contrary to the former opinions, that a horse, or the like, killing an *infant* within the age of discretion, is as much forfeited as if he were of age. *Horse killing an infant.* 1 *Haw.* 66.

Also, it was anciently holden, that things fixed to the freehold, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the later resolutions they cannot, unless they were severed before the accident happened. 1 *Haw.* 66. *Things fixed to the freehold.*

It is agreed by all, that a ship in salt water, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes not such misfortunes to the ship. Also it seems clear, that when a man riding on a horse over a river, is drowned thro' the violence of the stream, the horse is not forfeited, because not that, but the water caused his death. But it is said, that a ship, by a fall from which a man is drowned, in the fresh water, shall be forfeited, but not the merchandize therein; because they no way contribute to his death. *Ships in salt water.* And by the same reason it seems that if a man riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon only are forfeited, and not the loading, because it no way contributed to his death; for which reason, where a thing not in motion causes a man's death, that part thereof only, which is the immediate cause, is forfeited. *Ships in fresh water.*

As where one climbing upon the wheel of a cart, while it stands still, falls from it, and dies of the fall, the wheel only is forfeited: But if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater; and *Falling from the shafts of a waggon.* *Things in motion.*

and it is a general rule, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also. *Id.*

A cart meeting
a waggon.

Thus a cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and overturned, and threw a person that was in the cart, just before the wheels of the waggon, and the waggon run over him and killed him; it was resolved in this case, that the cart, waggon, loading, and all the horses were deodands, because they all moved to the death. 1 *Salk.* 220.

Weight of earth
falling.

If a weight of earth fall upon a worker in a mine, and kill him, the weight of the earth is forfeit, and not the whole mine. 1 *H. H.* 420.

Year and day.

In all these cases, if the party wounded die not of his wound, within a year and a day after he received it, there shall be nothing forfeited, for the law doth not look on such a wound as the cause of a man's death, after which he lives so long: But if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time. 1 *Haw.* 67.

Must be first
found by the
coroner's in-
quest.

However nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the town where it fell, and therefore the inquest ought to find the value of it. *Id.*

And if the coroner omits his duty in this case, the inquisition may be made by the commissioners of gaol delivery, oyer and terminer, or of the peace. 1 *H. H.* 419.

After all, as this forfeiture seemeth to have been originally founded, rather in the superstition of an age of ignorance, than in the principles of sound reason and policy, it hath not of late years met with great countenance in *Westminster-hall*. And when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the quantum of the forfeiture, the court of king's bench have refused to interpose in favour of the crown or lord of the franchise. In the case of *K. and Rolfe*, coroner of *Kent*, *H. 5 G. 2.* the coroner's inquest found, that a man sitting on his waggon accidentally

ally fell to the ground, and that the horses drawing the waggon forward, one of the fore wheels crushed his head, of which he instantly died, and then concluded that only the wheel, on which they set a small value, moved to his death. A motion was made, in behalf of Mr. *Monpeſſon*, lord of the franchise, for quashing this inquisition, upon affidavits tending to shew, that the cart and horses were equally instrumental, which indeed the finding of the jury did sufficiently imply. But the court was very clear, that neither this court nor the coroner can oblige the jury to conclude otherwise than they have done, and would not suffer the affidavits for quashing the inquisition to be read. A like case came on, *M. 29 G. 2. K. and Drew*, coroner of *Middlesex*. The coroner's jury, upon view of the body of a person killed by the like accident, found that only one wheel of the waggon moved to the death. The court, on motion, in behalf of the lord of the franchise, granted a rule for shewing cause why the inquisition should not be quashed for this misbehaviour of the jury. On the day for shewing cause, Mr. *Hume Campbell*, counsel for the lord of the franchise, informed the court, that upon looking into precedents, he was satisfied he could not support the rule: and thereupon it was discharged. The case of the *King and Rolfe* was mentioned on this occasion, and greatly relied on. *Fest. 266.*

Dice. See Cards and Dice, and Stamps.

Dissenters.

- I. *Of protestant dissenters in general.*
- II. *Dissenting ministers.*
- III. *Dissenting schoolmasters.*

I. *Of protestant dissenters in general.*

(1) **BY** the 1 *El. c. 2. s. 14.* Every person not having reasonable excuse, shall resort to their parish church or chapel, or upon reasonable let thereof, to some usual place where common prayer shall be used, on every Sunday

To resort to church, &c.

Sunday and holiday; on pain of punishment by the censure of the church, or of forfeiting for every offence 12 d.

(2) By the 23 *El. c. 1.* Every person above the age of 16, who shall not repair to some church, or chapel, of usual place of common prayer, shall forfeit for every month 20l. And if he shall forbear for 12 months he shall be bound to the good behaviour till he conform,

(3) By the 29 *El. c. 5.* Every offender in not repairing to church, having been once convicted, shall, without any other indictment or conviction, pay half yearly into the exchequer 20l. for every month afterwards, until he conform; which if he shall omit to do, the king may seize all his goods, and two parts of his lands.

(4) And by 3 *J. c. 4.* The king may refuse the 20l. a month, and take two parts of the land, at his option.

(5) And by the 3 *J. c. 5.* No recusant in not repairing to church, being convicted thereof, shall enjoy any publick office, or shall practise law or physic, or be executor, administrator, or guardian.

(6) And by the 35 *El. c. 1.* If any person refusing to repair to church, shall be present at any assembly, meeting, or conventicle, under pretence of any exercise of religion, he shall be imprisoned till he conform; and if he shall not conform in three months, he shall abjure the realm; which if he shall refuse to do, or after abjuration shall not go, or shall return without licence, he shall be guilty of felony without benefit of clergy. And whether he shall abjure or not, he shall forfeit his goods, and shall forfeit his lands during life.

Shall not be present at conventicles or meetings.

(7) And by the 22 *C. 2. c. 1.* If any person, being sixteen years of age, shall be present at any conventicle or meeting, under pretence of any exercise of religion, in other manner than according to the liturgy and practice of the church of *England*, at which there shall be five persons or more assembled, besides those of the household, if it be in an house where there is a family; or if it be in a house, field, or place, where there is no family, then where any five persons or more are so assembled,—every justice of the peace before whom information shall be made, shall (on pain of 100l. half to the informer) on proof by confession, or oath of two witnesses, or the notorious evidence of the fact, make record thereof (which shall be afterwards certified to the sessions), which record shall be a full conviction: Whereupon he shall impose upon every offender a fine of 5s. for the first offence, and for every other offence 10s. to be levied by distress and sale of the

goods

goods of the offender, or in case of the poverty of such offender, upon the goods of any other person then convicted of the like offence, so as the sum to be levied on any one person in case of the poverty of other offenders amount not in the whole to above 10*l.* on occasion of any one meeting; one third to the king, one third to the poor, and one third to the informer and to such persons as the justice shall appoint, having regard to their diligence in discovering, dispersing, and punishing of the said conventicles.

And every person who shall suffer any such meeting in his house, outhouse, barn, or backside, shall forfeit 20*l.* in like manner; and in case of his inability, it shall be levied on the goods of such persons who shall be convicted of being present.

Persons suffering meetings in their houses.

If the penalty exceeds 10*l.* an appeal lies to the sessions. And if the party is there found guilty by a jury, he shall pay treble costs. And no other court whatsoever shall intermeddle, but the quarter sessions only.

Appeal.

And justices and constables may with what force they think fit, upon refusal to open, break open doors where they shall be informed such conventicle is, and take the offenders into custody. And on certificate from any justice of peace of his particular information or knowledge of such unlawful meeting, and that he is not able, with such assistance as he can get, to suppress the same; any commissioned officer of the militia, or other his majesty's forces, with such troops or companies of horse and foot, and also the sheriff, and other ministers of justice, with such other assistance, as they shall think meet, or can get in readiness with the soonest, shall repair to the place, and by the best means they can, shall dissolve, dissipate, and prevent such meeting, and take the offenders into custody.

Doors not to be locked.

Thus stood the laws at the revolution.

Now by the 1*W.* c. 18. commonly called the act of toleration, which by the 19*G.* 3. c. 44. is declared to be a publick act, it is enacted, that neither the statutes aforesaid, nor any other made against papists and popish recusants (except the 25*C.* 2. c. 2. concerning the qualifying for officers, and 30*C.* 2. s. 2. c. 1. containing the declaration against popery) shall extend to any person dissenting from the church of *England*, who shall at the general sessions of the peace to be held for the county or place where such person shall live, take the oaths of allegiance and supremacy, and subscribe the said declaration against popery; of which the court shall keep a register: and no officer

Privileges given by the act of toleration.

shall

shall take any fee above 6d. for registering the same, and 6 d. for a certificate thereof signed by such officer.

Place of meet-
ing to be cer-
tified.

Provided, that the place of meeting be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions. And the register or clerk of the peace shall register or record the same, and give certificate thereof to any who shall demand the same; for which no greater fee shall be taken than 6d. And provided, that during the time of meeting, the doors shall not be locked, barred, or bolted.

T. 26 G. 3. *K. v. Hall.* This was a conviction on 22 G. 2. r. as follows :

*Parts of KESTIVEN, in } BB it remembered, that on
the county of LINCOLN. } the 2d day of March in the
26th year, &c. at New Sleaford in the parts of K. aforesaid, &c.
Robert Benson clerk came before me Richard Brown esquire,
one of the justices, &c. and gave me the said justice to under-
stand and be informed, that one Samuel Hall, carpenter, being
the occupier of a certain dwelling-house situate in the parish of
Hekington in the parts and county aforesaid, did willingly and
willingly suffer a meeting and unlawful assembly of divers per-
sons to be held in his said dwelling-house, for the exercise of
religious worship, in other manner than according to the li-
turgy and practice of the church of England, between the
hours of one and eight o'clock in the afternoon of the same day :
at which meeting and unlawful assembly, five persons and more
were assembled together, over and above those of the said
S. Hall's household; (the dwelling-house in which the said
meeting and unlawful assembly was held, not being certified to
the bishop of the diocese, or to the archdeacon of that arch-
deaconry, or to the justices of the peace at their general or quarter
sessions of the peace for the parts and county in which the said
meeting was held; nor registered in the said bishop's or arch-
deacon's court; nor recorded at the said general or quarter ses-
sions;) against the form of the statutes in such case made
and provided, whereby the said S. Hall hath forfeited the sum
of 20 l. to be distributed, &c. — And now, on the 6th day of
the said month of March, in the twenty-sixth year, &c. at, &c.
came the said S. Hall before me the said justice, in pursuance of
my summons, &c. when the said information, together with
the examination in writing of Joseph Wilkinson and
Joseph Chamberlain, both of H. aforesaid, two credible
witnesses, taken upon their respective corporal oaths before me
the said justice, being openly read; which said examination*

set forth, that on the said 26th day of February, the said J. Wilkinson and J. Chamberlain went to the dwelling house of the said S. Hall, and that one Joseph Merryweathers was preaching to the said assembly; that the said dwelling house at which the said meeting and assembly was holden, was not certified or registered as by law required: and that they also saw there Peter Jarvis, John Taylor, William Taylor, and Robert Bowles, all of the said parish of H. attending the said meeting. And the said S. Hall being now here required by me to answer the premises, he the said S. Hall pleadeth and confesseth the offence charged upon him in and by the said information. Wherefore, &c. he hath forfeited 20l.—

Bearcroft took several objections to this conviction: 1st, The information is not in the present tense. It is stated, that the inform came before the justice, and gave him to understand, &c. 2dly, That the evidence was not given in the presence of the defendant, which it ought to have been; the defendant should have been called on to plead before the evidence was received, but the justice read over improper evidence, which should not have been given, and then called on the defendant to answer the premises, by which means he was confounded and induced to plead guilty. 3dly, Though this is charged as an offence against statute 22 C. 2. only, yet it concludes contrary to the statutes, which is fatal. 4thly, The information does not contain a charge within the statute 22 C. 2. c. 1. upon which the justice professes to convict; and though it professes to set out an offence against that statute, yet it is not confined to that statute only, but negatives several exceptions in 1 W. c. 18. Therefore, tho' it was not necessary to negative any of the exceptions under the latter act, yet having undertaken so to do, the omission of any one is fatal, and it is not stated, that he did not take the oaths, &c. which is required by the 3d section of that statute.—

Balguy, in support of the conviction, was stopped by the court, who said, that however inclined they were to listen to trivial objections to such prosecutions, yet none of the present were sufficient in point of law.—As to the first, the words objected to were better in the past than present tense, because they referred to a time past, (viz.) the time of making the information. The 2d is cured by the defendant pleading guilty. As to the 3d and 4th, This is a conviction on 22 C. 2. therefore the exceptions in 1 W. c. 18. need not have been negatived, and may be rejected as surplusage, for if a subsequent statute make any exception to a former one, it is incumbent on the defend-

ant to shew that he comes within such exception. And besides the 13 *f.* of 22 *C. 2.* directs, that that act shall be construed most largely and beneficially for the suppressing of conventicles, &c. and that no proceedings thereupon shall be impeached for want of form. *Conv. affirmed. Gas. by Durnf. and East, 1 V. 320.*

Disturbing the congregation.

And if any person shall willingly and of purpose maliciously or contemptuously come into any congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher; shall, on proof thereof before any justice, by two witnesses, find two sureties in 50 *l.*; and in default of such sureties, shall be committed to prison till the next sessions; and upon conviction at such sessions, shall forfeit 20 *l.* to the king. 1 *W. & M. c. 18. f. 18.*

Being appointed to offices, may appoint a deputy.

And if any person dissenting from the church of *England* as aforesaid shall be appointed to the office of high constable, petty constable, churchwarden, overseer of the poor, or any other parochial or ward office, and shall scruple to take upon him the office, in regard of the oaths or otherwise, he may execute the same by a sufficient deputy, that shall comply with the laws on this behalf. Provided that the deputy be allowed and approved, by such person, and in such manner, as such officer should by law have been allowed and approved. 1 *W. & M. c. 18. f. 7.*

II. Dissenting ministers.

Disabilities before the revolution.

(1) By the 17 *C. 2. c. 2.* No person, who shall take upon him to teach or preach in any meeting or conventicle, under pretence of any exercise of religion, shall, unless only in passing upon the road, or unless required by legal process, come within five miles of a city, town corporate, or borough, without taking an oath of allegiance therein mentioned; on pain of 40 *l.* one third to the king, one third to the poor, and one third to him who shall sue in the courts at *Westminster*, assizes, or sessions. And two justices, on oath of the offence, may commit him for six months.

(2) And by the 22 *C. 2. c. 1.* If any person shall take upon him to preach or teach in any meeting or conventicle, in other manner than according to the practice of the church of *England*, he shall forfeit for the first offence 20 *l.* and for every other offence 40 *l.* And if he be a stranger, or in the judgment of the justice of the peace before whom he is convicted unable to pay, it may be levied on the goods of any person present.

(3) And

(3) And by the 13 & 14 C. 2. c. 4. s. 14. No person shall presume to consecrate and administer the sacrament before he be ordained priest, according to the form and manner of the church of *England*, on pain of 100l.

Now by the aforesaid act of toleration, and by the 19 G. 3. c. 44. No person dissenting from the church of *England*, in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of dissenting protestants, shall be liable to any of the aforesaid penalties, who shall, at the sessions as aforesaid of the place where he shall live, take the said oaths of allegiance and supremacy, and subscribe the said declaration against popery, and also make and subscribe a declaration in the words following: viz. *I A. B. do solemnly declare, in the presence of almighty God, that I am a christian and a protestant, and as such, that I believe that the scriptures of the old and new testament, as commonly received among protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice:* For the registering of which he shall pay 6d. to the officer of the court, and no more, and 6d. for a certificate thereof signed by such officer.

Privilege given
by the toleration
act.

And any preacher or teacher, duly qualified, shall be allowed to officiate in any congregation, although the same be not in the county where he was so qualified; provided that the place of meeting hath been duly certified and registered; and such teacher or preacher shall, if required, produce a certificate of his having so qualified himself, under the hand of the clerk of the peace where he was qualified; and shall also, before any justice of such county where he shall so officiate, make and subscribe such declaration, and take such oaths as aforesaid, if required. 10 An. c. 2. s. 9.

Being qualified;
may act in any
county.

And every such teacher and preacher, having taken the oaths, and subscribed as aforesaid, shall from thenceforth be exempted from serving in the militia of this kingdom, and from serving on any jury, or of being appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, parish, division, or wapentake. 1 W. & M. c. 18. s. 11. 19 G. 3. c. 44. s. 1. 26 G. 3. c. 107. s. 27.

Exempted from
offices.

III. *Dissenting schoolmasters.*

(1) By the 23 *El. c. 1.* If any person shall keep a schoolmaster, who shall not repair to church, or be allowed by the bishop, he shall forfeit 10*l.* a month, and the schoolmaster shall be imprisoned for a year.

(2) By the 17 *C. 2. c. 2.* No person shall be schoolmaster, or take any boarders or tablers to be instructed by himself or any other, without taking an oath of allegiance therein mentioned, on pain of 40*l.*

(3) By the 13 & 14 *C. 2. c. 4.* Every schoolmaster keeping any publick or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, shall, before his admission, subscribe before the ordinary the declaration of conformity to the liturgy of the church of *England*, on pain of being disabled to hold the said school. And if any schoolmaster, or other person, instructing or teaching youth in any private house or family as tutor or schoolmaster, shall teach any youth as tutor or schoolmaster, before licence obtained from the bishop or ordinary of the diocese, and before such subscription as aforesaid; he shall for the first offence be imprisoned three months, for the second and every other offence be imprisoned three months, and forfeit 5*l.*

But by the 19 *G. 3. c. 44.* No dissenting minister, nor any other protestant dissenting from the church of *England*, who shall take the aforesaid oaths, and make and subscribe the abovementioned declaration against popery, and the declaration herein before mentioned, shall be prosecuted in any court whatsoever, for teaching and instructing youth as a tutor or schoolmaster.

Provided, that this shall not extend to the enabling any person dissenting from the church of *England* to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first year of king *William* and queen *Mary*, for the immediate use and benefit of protestant dissenters.

Note, The forms of the said oaths and declaration are inserted in the title *Oaths*.

Distress.

A Distress is the taking of a personal chattel out of the possession of the wrong doer, into the custody of the party injured, to procure a satisfaction for the wrong committed: and is of two kinds; either for cattle trespassing and doing damage, or for nonpayment of rent or other duties.

The remedy for recovering rent by way of distress seems first to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal service, was a forfeiture of the estate: But these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law; that is, the land that is let out to the tenant is hypothecated, as a pledge in his hands, to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure for the payment and satisfaction thereof.

Concerning which we will shew,

- I. For what causes a distress shall be.*
- II. What goods may be distrained, and what not.*
- III. At what time the distress shall be taken.*
- IV. Where the distress shall be made.*
- V. Goods fraudulently conveyed off the premises.*
- VI. That reasonable distress shall be taken.*
- VII. Manner of making distress.*
- VIII. Distress how to be demanded.*
- IX. Of rescous and pound breach.*
- X. Replevyng the distress.*
- XI. Sale of the distress.*
- XII. Irregularity in the proceedings.*
- XIII. Landlord re-entering on nonpayment.*
- XIV. Case of tenant holding over.*
- XV. Attorning to strangers.*
- XVI. Deserting the premises.*
- XVII. Rent in case of an extent or execution.*
- XVIII. Rent on the death of tenant for life.*

Distress.

XIX. Rent how far recoverable by executors or administrators.

XX. Of distress by warrant of justices of the peace.

I. For what causes a distress shall be.

Rent in arrear.

Distress for rent must be, for rent in arrear; therefore it may not be made on the same day on which the rent becomes due; for if the rent is paid in any part of that day, whilst a man can see to count money, the payment is good.

Tender of payment.

It must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent behind, before the distress the tenant may upon the land tender the arrearages, and if after that a distress be taken it is wrongful: and if the landlord have distrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not, the detainer is unlawful. Even so it is, in case of a distress for damage feasant (or damage done by cattle, trespassing), the tender of amends before the distress maketh the distress unlawful; and after the distress, and before the impounding, the detainer unlawful. 2 Inst. 107.

But in this case, altho' the owner tender sufficient amends, yet he cannot take his beasts out of the pound, if the amends be refused; but he must replevy: and if it be found at the trial that the amends was not sufficient, the person on whom they trespassed shall have damages; if the amends tendered were sufficient, then the owner of the beasts shall have damages. Dr. & St. 112.

In the case of *Firth v. Purvis*. M. 34 G. 3. which was an action to recover treble damages for pound breach upon 2 W. & M. c. 5. The case was, The landlord distrained four pipes of beer for rent in arrear, and impounded them in a convenient part of the premises, which was a public-house, and gave proper notice to the tenant, with intent to appraise and sell the same; That about an hour after the distress was made, while the landlord was upon the premises, the tenant said to him, "Come to the bar with me, and I will pay you your rent and demands," and at the same time he pulled a purse out of his pocket which he held in his hand; to which the landlord answered, "No, I will not have the money, I will have the casks I have seized." Subsequent offers to pay the

rest were made to the landlord, which he refused, insisting upon the treble damages.—The court were inclined to think that this was not a good tender, but, said, that at any rate a tender after impounding the distress made, was insufficient. *Durnf. and East*, 5 V. 432.

The like remedy may be had by distress, impounding and sale; in cases of rent-seck, rents of assize, and chief rents, as in case of rents reserved upon lease. 4 G. 2. c. 28. s. 5. Seck rents and chief rents.

Note, there are three kinds of rents; rent *service*, rent *charge*, and rent *seck*.

Rent *service* is, where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other service, and certain rent. And it is called a rent service, because it hath some corporal service incident to it, which at the least is fealty. 1 *Inst.* 141, 2.

Rent *charge* is so called, because the land for payment thereof is charged with a distress: but before this act such distress could not be sold, but only detained till the rent should be paid.

If the rent be reserved, without any clause put in the deed of distress for the same, then it is called a rent *seck*, *redditus fixus*, or dry rent: and the difference between a rent charge and a rent seck is, that there is a clause of distress annexed to one, and no such clause to the other; and therefore the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the person of the grantor in a writ of annuity. 1 *Inst.* 143.

Rents of *assize* are the certain rents of freeholders and ancient copyholders, so called, because they are assized and certain, and thereby distinguished from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. 2 *Inst.* 19.

On a parol demise, or verbal lease, where the quantum of the rent agreed upon can appear in certain, the landlord may distress: But whereas there are often difficulties when the agreement is not by deed, the landlord in such case may recover a reasonable satisfaction in an action on the case, for the use and occupation of the lands. And if in evidence on the trial, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear; the plaintiff shall not therefore be nonsuited, but may make use thereof as an evi-

Agreement not by deed.

dence of the quantum of the damages to be recovered, 11 G. 2. c. 19. §. 14.

Rent reserved
on a lease for
life.

So an action of debt may be brought against a tenant for life, in pursuance of the statute of the 8 An. c. 14. which enacteth, that whereas before the said statute no action of debt did lie against a tenant for life or lives, for any arrears of rent during the continuance of such estate for life or lives; it shall be lawful, for any person having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears, in like manner as he might have done in case such rent were reserved upon a lease for years. §. 4.

Lease deter-
mined.

Persons having rent in arrear, upon any lease determined, may distrain for such arrears after the determination of the lease, in the same manner as if it had not been determined; provided that such distress be made in six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrear became due. 8 An. c. 14. §. 6, 7.

In the case of *Beavan* against *Delahay* and *Lewis*, E. 28 G. 3. in the *common pleas*. It was determined, that a custom, that a tenant may leave his away going crop in the barns and outhouses of the farm for a certain time after the lease is expired, and he has quitted the premises, is good: And the landlord may distrain the corn so left for rent in arrear, after six months have expired from the determination of the term. *Caf.* by *H. Black.* 1 V. 5.

Lease renewed.

Whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under tenants; and whereas many of those leases cannot be renewed without a surrender of all the under leases derived out of the same, whereby it is in the power of any such under tenants to prevent or delay the renewing of the principal lease; it is enacted, that in such case, the chief leases may be renewed, without surrendering all the under leases; and the like distress or entry may be had, as if the former chief lease had been still kept on foot and continued, or the under leases had been renewed under such new principal lease. 4 G. 2. c. 28. §. 6.

Two distresses
for one rent.

Before the statute of the 17 C. 2. c. 7. in case a distress was too little, where sufficient distress was to be had, a man could not distrain again, be the demand never so great; for it was his folly that at first he distrained no more. *Mo.* 7. *Cam.* 546.

But

But now, by the said statute, in all cases where the value of the cattle distrained shall not be found to be to the full value of the arrears distrained for; the party to whom such arrears were due, his executors or administrators may distrain again for the residue of the said arrears.

f. 4.

So in like manner, where the distress is made by virtue of the warrant of a justice of the peace, in nature of an execution. And the distinction seemeth to be this: where a person hath an entire duty, he shall not split the entire sum, and distrain for part of it at one time, and for part of it at another time, and so *toties quoties*, for several times; for that is great oppression. But if a man seizeth for the whole sum that is due to him, and only mistakes the value of the goods seized (which may be of very uncertain, or even imaginary value, as pictures, jewels, race horses, and the like), there is no reason why he should not afterwards complete his execution by making a further seizure. *Burr. Mansf* 589.

In trespass for taking goods, the defendant justified, that he demised some tenements to the plaintiff for one term, and others for another term; and that rent being in arrear on both demises, he distrained the goods: on demurrer the distress was held ill; for these being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents; and no distress on one part can be good for both rents, for these reasons therefore, the plaintiff had judgment. *2 Str.* 1040.

One distress on two separate demises.

But where lands lying in different counties are held under one demise, at one entire rent; in such case a distress may be lawfully taken in either county for the whole rent in arrear. *1 L. Raymond*, 55.

Lands lying in different counties.

It any distress and sale shall be made, for rent in arrear and due, when none is in truth due, the owner shall recover double value with full costs. *2 W. Sess.* 1. c. 5.

Distraining where no rent is due.

f. 5.

And if the distress be taken of goods without cause, the owner may make *rescous*; but if they be distrained without cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law. *1 Inst.* 47.

II. What goods may be distrained, and what not.

Distress for rent must be of a thing, whereof a valuable property is in somebody; and therefore dogs, bucks, doers,

Valuable property.

does, conies, and the like, that are *feræ naturæ*, cannot be distrained. 1 *Inst.* 47.

Separate from
the person.

Altho' it be of valuable property, as a horse; yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained. *Id.*

But it is said, that if one be riding upon a horse damage feasant, the horse may be led to the pound with the rider upon him. 1 *Sid.* 440. 442.

But in the case of *Storey v. Robinson*, H. 35 G. 3. upon an action of trespass for an assault and false imprisonment, and for seizing and leading away the plaintiff's horse upon which he was riding.—L. *Kenny* Ch. J. said, This distress cannot be supported. All the authorities upon this point are collected together in the notes in *Hargr. Co. Lit.* 47. and the clear result of them is that such a distress is illegal. If it were permitted to a party to distress a horse while any person is riding on him, it would perpetually lead to a breach of the peace. Judgment for the plaintiff. *Dunf. and East*, 6 V. 138.

And it hath been held, that horses joined to a cart, with a man upon it, cannot be distrained for rent (altho' they may for damage feasant); but both cart and horses may, if the man be not upon the cart. 1 *Vent.* 36.

For maintenance
of trades.

Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which by consequence are for the commonwealth, and are there by authority of law: as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor an horse in an hoftry, nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn or meal in a mill, nor any thing distrained for damage feasant, for it is in custody of the law; and the like. 1 *Inst.* 47.

Carriage and
horses at livery.

In the case of *Francis and Wyatt*, T. 4 G. 3. Mr. *Wyatt* the landlord distrained for rent a chariot of Mr. *Francis*, who thereupon brought a replevy; setting forth, that the coach house in which his chariot was taken, was part of certain other coach houses and stables known by the appellation of the *Talbot livery stables*, whereof one *Matthew Wilkinson* was the tenant and occupier under a demise from the said Mr. *Wyatt* for a term of years, at the annual rent of 60*l.* That *Wilkinson*, during such his occupation of the premises, used and followed the trade and business of a common public livery stable keeper, for keeping gentlemen's horses and setting up their coaches and

carriages:

carriages: That the plaintiff *Mr. Francis* set up his chariot there, at livery, with the said *Wilkinson* as at a common public livery stable keeper's; and that the landlord *Mr. Wyatt* took his chariot, so standing in the said coach house, as a distress for rent due to him from the said *Wilkinson*, to the wrong and injury of the said *Mr. Francis*. The question was, Whether a gentleman's chariot, which stood in a coach house belonging to a common livery stable keeper, was distrainable for rent due to the landlord from the livery stable keeper.—For the plaintiff *Mr. Francis* it was argued, that the livery stable is exactly upon the foot of a common inn, and intitled to the same privileges and exemptions; and is equally to be protected, upon the principles of necessity, utility, and convenience to the community; and if horses and carriages are not privileged therein, it will put an end to that branch of commerce. And the common cases were cited, of goods carried to a fair or market, and the horse carrying the same, of corn sent to a mill, cloth to a taylor, wool sent to be spun, stuffs sent to a dyer, goods sent by a carrier, or left at a common wharf; all which are privileged from distress. For the landlord, it was argued, that these coach houses are not in the nature of common inns, for the master of them is not bound to take in horses and carriages as an innkeeper is, any more than the master of a publick boarding school is bound to receive all boarders, or a common brewer to serve all customers: That the right of putting up horses and carriages in the one arises from private contract; in the other, from authority of law, which is the ground of the protection extended to these houses by law. If indeed the plaintiff's carriage had been sent to a coachmaker's to be repaired, it might for the time have been privileged; but here is no such necessity. By hiring the coach house (whether by the week, the quarter, or the year) he becomes an under-tenant, and must be liable to the landlord's distress, as much as a man who hires an unfurnished room in a lodging house.—By *L. Mansfield Ch. J.*: Whatever may be the law of this case, it is worth the landlord's while to consider the consequences of taking such a distress, which will ruin his estate. For if it should be determined that carriages and horses standing at livery are liable to be distrained by the landlord for rent, the livery stables will be all deserted and undone; for no prudent man will make himself liable to such an hazard. Therefore let this case stand over for farther argument,
and

and let the landlord in the mean time seriously consider how far in prudence he ought to press the question.— But Mr. *Francis* perceiving the opinion of the court to be against him, did not think proper to bring the matter to a further argument. And afterwards, in the *Easter* term following, the landlord moved for judgement, and judgement was given for him, upon the ground of its being part of the profits of the premises; which distinguishes it from the case of goods sent to be manufactured, and the like. *Burr. Manif.* 1498. *Black. Rep.* 483.

Tools of a man's
profession.

Beasts belonging to the plough shall not be distrained (which is the ancient common law of *England*, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the book of a scholar) while goods or other beasts may be distrained. *2 Inst.* 47.

But this rule holds only in distresses for rent arrear, amerciaments, and the like; but doth not extend to cases where a distress is given, in the nature of an execution, by any particular statute, as for poor rates, and the like. *3 Salk.* 136.

So in the case of *Hutchins and Chambers*, *B.* 31 G. 2. On a special verdict: Several geldings were distrained for the poor rate, which were stated to be beasts of the plough and cart; when there were other goods more than sufficient to answer the value of the demand. It was objected, that by the statute of 51 H. 3. st. 4. (which was also in affirmance of the common law) *none shall be distrained by his beasts that gaigne his land*. In the argument of this cause it was observed, that this duty, on the statute of the 43 *Eliz.* is not a tax upon the land, nor payable out of it, but a charge upon the person: and it is a tax throughout the kingdom, and for publick benefit: That it is not to be considered upon the foot of a common law distress: That the nature, design, and end of this publick duty required the most effectual and speedy remedy that could be devised: That the reason why beasts of the plough could not be distrained at common law, will not hold in the present case. This is similar to an execution, and essentially different from a distress at common law. By the common law the distress could not be sold: It was only taken *nomine pœnæ*; not as a satisfaction (which this is) for the duty. The reasons for the privilege do not now hold. Agriculture then wanted and required encouragement, and must have been impeded by a common-law distress: Now it doth not. Then, the thing

thing distrained could not be sold, and remained useless: Now, it may be sold. This distress is not taken as a pledge, or a mean to compel; but for a satisfaction for the duty itself, a personal duty, and of a publick nature. —And by *L. Mansfield Ch. J.* This seising is but partly analogous to the common law distress; but is much more analogous to the common law execution. In the old common law distresses, which were in nature of a *nomine pœna* to compel payment, it would have been absurd to have suffered the implements by which a man gained his livelihood to be holden as a pledge; because that would have been taking from the man the only means he had of being able to pay the debt. But this reason doth not hold, where the things distrained may immediately be sold by way of satisfaction; which, though called a distress, yet really is, in this respect, an execution. And in cases of execution, beasts of the plough may be distrained, altho' there be other sufficient distress. And the court were unanimously of opinion, that beasts of the plough are distrainable under the statute of the 43 *Eliz.* and such like acts of parliament. *Burr. Mansf.* 579.

And in the case of *Gorton* and another v. *Falkner, H.* 32 G. 3. in trover for three looms, a special case was reserved. The plaintiffs, being manufacturers of small wares at *Manchester*, employed one *Minikin* as a small ware weaver there, to make linen and cotton tapes for them; and for that purpose lent him two looms for himself and wife to weave upon, and some time after lent him another loom. *Minikin* and his wife worked upon two of the looms, and a journeyman of *Minikin's* had been seen to work on one of them. The looms were used and worked upon in a part of a house in which *Minikin* resided at *Manchester*, which was let to him by the defendant. For the use of the looms *Minikin* was not to pay the plaintiffs any thing, but was to work for them only, which was stated to be a customary method at *Manchester* for workmen in that way. *Minikin* being tenant to the defendant of part of his house, and rent being due for the same; the defendant distrained the said looms so lent to *Minikin*, for rent upon the premises; and afterwards sold the same according to the statute. At the time of the distress there were no other goods upon the premises.—*L. Kenyon Ch. J.* It is not necessary in this case to decide the question which (it was said) was intended to be raised on the construction of the statute of 2 *H. & M. c.* 5. whether all goods are liable to distress

Distress.

for rent, because there are other grounds here to warrant us in determining that the distress was properly taken. It will be sufficient to decide that case whenever it shall arise; but I cannot refrain from observing, as it strikes me at present, that that act of parliament has not taken away all privileges from distress, but has merely given the power of selling those things which might have been distrained before. This case might have been stated more explicitly, particularly if the looms were in actual use at the time of the distress; however we must now decide on the case as is sent to us. We may lay it down as a general proposition, that at this time all moveable chattels are distrainable, whatever may have been said in ancient times to restrain the distress to those things which partook of the profits of the soil: now, not only living animals, but also inanimate things, may be distrained. But to this general proposition there are several exceptions; some things are exempt from being distrained on account of the place, and others on account of the things themselves. The anvil in the smith's shop, and the millstone, are privileged, because they are affixed to the freehold; and a temporary removal of the one or the other for the purpose stated in the argument is not sufficient to destroy that privilege. In the case of *Francis v. Wynt* (see above), the court thought, that the same reason did not exist, that a livery stable should have the same privilege as a common inn. There are several other exceptions, which it is not necessary to state particularly; they are all collected in 3 *Com. Dig.* 112; from whence it appears that utensils of trade are not liable to be distrained while they are in actual use; one of the instances given is that of an axe in a carpenter's hand; and this exemption is founded on good sense; it is allowed not only for the convenience of trade, but for the preservation of the peace. *Mercia caruæ* are also privileged, provided there be other sufficient distress; but if not, they may be distrained. Now in this case it is not stated that these looms were in actual use at the time of the distress, though they *had been* used and worked upon, which is too loose and indefinite a finding to warrant us in supposing that they were then in use; and it is stated that there were no other goods upon the premises liable to the distress. Therefore I am of opinion that the distress was properly made.—*Asbburst, J.* It is a general principle that all chattels found in a person's house are liable to be distrained by the landlord; it is true indeed that there are some exceptions

exceptions to the general rule, but this case does not come within either of those exceptions. The foundation of this principle is that, as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there. Now it does not appear from the facts stated, that the looms were privileged from distress. It is not found that they were in work at the time of the distress; but it is stated that there were no other goods liable to be distrained: And it is a general rule that implements may be distrained, if there be no other goods subject to a distress.—*Buller J.* Whether goods be the property of the tenant or a stranger is perfectly immaterial, provided they be on the premises, and be not privileged by law from a distress. The question therefore is, whether these goods, which were on the premises, be privileged by law from being distrained. Mr. J. *Buller* here read the following note of *L. Ch. J. Willes's* judgment in the case of *Simson v. Harcourt* in the Common Pleas. *M. 18 G. 2.* This was an action of trover for a stocking loom. The defendant pleaded not guilty. The cause was tried at *Leicester* assizes, and a special verdict to the effect following. That the plaintiff was possessed of a stocking frame of the value of 8*l.* which he let to *J. Armstrong* at 9*d.* per week, who was by trade a stocking weaver; that *Armstrong* was indebted to the defendant in 53*l.* for rent, and that no other sufficient distress being on the premises, the defendant distrained this stocking frame for the rent in arrears at the time when *Armstrong's* apprentice was using the same; and the jury submitted to the court if, &c.

- 1st, Whether a stocking frame has any privilege at all from being distrained?
- 2dly, If it have, whether it may not be distrained, when there is no other sufficient distress to be found?
- 3dly, Whether or not (when no sufficient distress is to be found) it will be privileged by being in actual use?

There are five things which by the common law are not distrainable; 1st, things annexed to the freehold; 2d, things delivered to persons exercising their trade, as cloth in a taylor's shop; 3d, hops and corn; 4th, instruments of the plough; 5th, instruments of trade. The three first were absolutely privileged; the two last only *sub modo*. As to the first they are not distrainable at this day; nor was corn distrainable before the stat. of *W. and M.* and the reason was because they could not be restored in the same plight they were in when taken. Beasts of the plough were not distrainable,

trainable, in favour of husbandry, which is for the general good of the nation; and if they were distrained, the means of a person's livelihood would be taken away, which last reason holds for instruments of trade. *Co. Litt.* 47. This frame is certainly an instrument of trade: And we are of opinion it may be distrained when no other distress is to be found. This puts an end to the two first questions. The third is the only material one; and we are of opinion that this stocking frame was not distrainable tho' in actual use, because it could not be restored in the same plight; for the stocking then weaving must necessarily be damaged; another reason is because when it is in the custody of any person in actual use, it cannot be taken away without a breach of the peace. *1 Inst.* 47. There is a plain distinction in *Bracton*, and all the other books, between *catalla otiosa*, and those in actual use. There is but one case which looks the contrary way, (*viz*) *1 Sid.* 440. and even there a *quære* is made; and I am far from thinking that case to be law. For these reasons let the plaintiff have judgment." Now the present case falls within the fifth class, which Ch. J. *Willes* said was only privileged *sub modo*; they are only under the same protection as *averia caruæ*. The point in that case was that the frame could not be distrained, because it was in actual use at the time. And for the reason now given by L. *Kenyon*, a distress could not be made under such circumstances without a breach of the peace. As therefore the looms in this case were not in actual use at the time of the distress, I am of opinion that the plaintiffs are not entitled to recover.—*Grise J.* delivered his opinion to the same effect. *Postea* to the defendant. *Durnf. & East*, 4 V. 565.

Things fixed to the freehold.

Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. *1 Inst.* 47.

A mill stone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is out of necessity, and the stone still continues part of the mill; so it is of a smith's anvil on which he works, for this is accounted part of the forge, though it be not actually fixed by nails to the shop. *Bro. Tit. Dist.* Bl. 23.

Things for which a replevin will not lie.

Things for which a replevin will not lie, known again, as money out of a bag, cannot be distrained. *2 Bac. Abr.* 109.

But money in a bag sealed may be distrained; for that the bag sealed may be known again.

Goods

Goods in the custody of the law are not distrainable; therefore goods distrained for damage feasant, cannot be taken for rent, nor goods in a bailiff's hands on an execution, nor goods seized by process at the suit of the king, because they are in the custody of the law. *Co. Lit.* 47. Goods in custody of the law.

By the 2 *W. sess.* 1. c. 5. Persons having rent arrear on any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with rent, and may lock up or detain the same in the place where found, in the nature of a distress; so as the same be not removed to the damage of the owner, out of the place where found and seized, but be kept there (as impounded) till replevied or sold. *f.* 3. Corn or hay cut.

Also by the 11 *G.* 2. c. 19. The landlord may take and seize corn, grafs, hops, roots, fruits, pulse, or other product growing, as a distress; and the same may cut, gather, make, cure, carry, and lay up when ripe, in the barns or other proper place on the premises; and if there shall be no barn or proper place on the premises, then in any other barn or proper place which he shall procure, so near as may be to the premises; the appraisement whereof shall be taken when cut, gathered, cured, and made, and not before. *f.* 8. Corn or hay growing.

And notice of the place where the goods so distrained shall be lodged, shall in one week after the lodging thereof be given to the tenant, or left at the last place of his abode. *f.* 9.

Generally, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent; for otherwise a door would be opened to infinite frauds upon the landlord; and the stranger hath his remedy over by action on the case against the tenant, if by the tenant's default the goods are distrained, so that he cannot render them when called upon. 3 *Blackst.* 8. Cattle depastured.

But on particular circumstances perhaps a court of equity may relieve. As in the case of *Fowkes and Joyce, T. 1 W.* in the common pleas, a person driving sheep to London to sell, by agreement with the master of an inn, put them into the ground at so much a score for a night. The landlord seeing them, asked whose they were, but consented to their staying there, and afterwards distrained them for rent due to him from the master of the inn. And it was adjudged for the landlord. 3 *Lev.* 260. 2 *Ventr.* 50. But in the same case, upon a bill for relief in equity, the lords

commissioners seemed to think, that the grounds lying to the inn, and used therewith, ought to have the same privilege as the inn hath, and that passenger's cattle ought not to be distrainable there. 2 *Vern.* 129.——And it appeared in this case, that on the landlord's coming and seeing the sheep, he pretended to be angry. Upon which the owner offered to take out the sheep, at which time they were not distrainable for the rent, having not been levant and couchant (that is, having not so long remained upon the ground, as to have laid down and risen up again to feed). So that the court looked on the consent as a fraud, to get them to be left all night, by which they became liable to the distress. And it was decreed, that the landlord should answer for the value of the sheep, and pay costs both in law and equity. *Proc. Chan.* 7.

Cattle escaped
on the premises.

Where a stranger's beasts escape into the land, they may be distrained for rent, though they have not been levant and couchant, provided they are trespassers: But if the tenant of the land is in default, in not repairing his fences, whereby the beasts came into the land, the landlord cannot distrain such beasts, though they have been levant and couchant, unless he have caused notice to be given to the owner, and the owner suffers them to remain there afterwards. *Lutw.* 364.

But in case of an ancient feignory, the lord may distrain cattle for services, which came in by escape, though they were not levant and couchant; although it be in default of the fences, which the tenant of the land ought to maintain; because the lord hath nothing to do with the repairing of the fences, and he hath no remedy but by distress: But the owner may prevent the distress, by making fresh pursuit; for then the cattle remain as it were in his own possession. *L. Reym.* 168, 9. *H.* 8 *W.* Kemp. and Crews.

But in case of rent reserved upon lease for years, the landlord cannot distrain such cattle, until they be levant and couchant; for if the landlord had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant to oblige him to repair: and therefore in that case, if the law would allow the landlord to distrain the cattle of a stranger which come in by escape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be distrained before they be levant and couchant; and if in default of the tenant of the land, there they cannot be distrained until

til they have been levant and couchant, that is to say, for rent upon leases for years. And in such case the landlord shall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his distress; and if he doth not come to take them away, then they become distrainable. And by *Treby* chief justice; where the cattle escape accidentally, there they are not distrainable, until they have been levant and couchant; but if they escape by default of their owner, they are distrainable the first minute. *Id.*

In the case of *Bradon and Pierce*, *H.* 1690, where a rent charge was arrear for 20 years, and cattle escaped out of the next ground, and were distrained; lord *Nottingham* (in equity) relieved against it. *2 Vern.* 231.

A man may distrain beasts *damage-feasant*, that is doing damage or trespassing upon his land; for it is highly reasonable that the owner of the land should defend himself from injury by driving out the beasts, and likewise by distraining the thing that did the injury, and putting the same in a publick pound till compensation be made for the trespass; for otherwise he might never find the person whose beasts committed the trespass. *Gillb. Dig.* 24. *Black. Com.* 6.

Cattle damage-feasant.

All chattels whatever are distrainable *damage feasant*, it being but natural justice that whatever doth the injury should be a pledge to make compensation for it. *Gillb. Dig.* 38.

Therefore the tools and utensils of a man's trade may be taken damage-feasant. *Id.* 39. *2 Bac. Abr.* 116.

If a man take cattle, and put them into the land of another man, the tenant of the land may take these cattle damage-feasant, though the owner was not privy to the cattle being damage-feasant, and he may keep them against the true owner, till satisfaction of the damages. *1 Rol. Abr.* 665. *Rel. Rep.* 449.

If a man come to distrain, and see the beasts in his ground, and the owner chase them out of purpose before the distress taken; yet the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them; for the beasts must be damage-feasant at the time of the distress. *1 Inst.* 161.

For distress damage-feasant is the strictest distress that is, and the thing distrained must be taken in the very act: for if the goods are once off, though on fresh pursuit, the owner of the ground cannot take them. *12 Mod.* 661.

Distress.

If ten head of cattle were doing damage, a man cannot take one of them and keep it till he be satisfied for the whole damage, but for its own damage only; but he may bring an action of trespass for the rest. 12 *Mod.* 660. *H. 13 W. Vasper and Edwards.*

If a man hath common for ten cattle, and he puts in more, the surplufage above ten may be taken damage feasant. 1 *Roll's Abr.* 665.

But this must be where the number is absolutely certain, as for 10, 20, or 30 cattle, without any relation to the quantity of land, and not where he claims for so many cattle for such a number of acres; for in the former case the overcharge is clear and self-evident, but in the latter it depends upon the number of acres, and requires a medium to determine the number of cattle; that is, an admeasurement of the land: For when the question depends upon a collateral fact, or upon a matter of judgment, the party interested can never be a competent judge in his own cause. And the court said, the right of distraining seemed to turn upon this, that wherever there is a colour of right for putting in the cattle, a commoner cannot distrain, because it would be judging for himself in a question that depends upon a more competent enquiry: But where cattle are put upon the common without any colour or pretence of right, the commoner may distrain them; and therefore he may distrain the cattle of a stranger. *E. 9 G. 3. Hall v. Harding, Bur.* 2426.

III. At what time the distress shall be taken.

For a rent or service the lord cannot distrain in the night, but in the day time; and so it is of a rent charge; but for damage-feasant, one may distrain in the night; otherwise it may be, the beasts may be gone before he can take them. 1 *Inst.* 142.

For before sun rising, or after sun-set, no man may distrain but for damage-feasant. *Mirror, c. 2. f. 26.*

IV. Where the distress shall be made.

Church lands.

The king's officers, as sheriffs and others, shall not take distresses in the fees wherewith churches in times past have been endowed; but distresses may be taken in possessions of the church newly purchased. 9 *Ed. 2. c. 9.*

On the premises.

A man may distrain in places or lands within the fee, liable to distress, and not elsewhere. 52 *H. 3. c. 51. 2 Inst.* 131. *Mir. c. 2. f. 26.*

And

And by the 11 G. 2. c. 19. The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any ways belonging to the premises demised, *f. 8.* On the common.

No person (except the king's officers) shall take distresses in the king's highway. *52 H. 3. c. 15.* In the highway.

And the reason is, because the king's subjects ought to have free passage, as well to fairs and markets, as about their other affairs. But yet this shall not be taken, to make the distress utterly unlawful, so as to take advantage thereof in bar to an avowry, but to this purpose, that if the lord distrain in the highway, the tenant may have an action against him upon this statute. *2 Inst. 131, 132.*

V. Goods fraudulently conveyed off the premises.

By the 11 G. 2. c. 19. If any tenant for life, years, at will, sufferance, or otherwise, shall fraudulently or clandestinely convey off the premises, his goods or chattels, to prevent the landlord from distraining, such landlord, or any person by him lawfully impowered, may in 30 days next after such conveying away, seize the same wherever they shall be found, and dispose of them in such manner, as if they had been distrained on the premises. *f. 1.* May be seized within 30 days.

But no landlord shall distrain any goods sold *bona fide* and for a valuable consideration, before such seizure made, to any person not privy to such fraud. *f. 2.* Except when bona fide sold.

Where any goods or chattels fraudulently or clandestinely conveyed or carried away, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall be lawful for the landlord, or his steward, bailiff, receiver, or other person or persons impowered, to take and seize as a distress for rent, such goods and chattels (first calling to his assistance the constable, or other peace officer of the hundred, district, or place, where the same shall be suspected to be concealed, and in case of a dwelling-house, oath being also first made (G) before a justice, of a reasonable ground to suspect that such goods or chattels are therein) in the day time, to break open (H) and enter into such house, barn, stable, outhouse, yard, close, and place; and to take and seize such goods and chattels for the said arrears of rent, as he might have done if they had been in any open place. *11 G. 2. c. 19. f. 7.* Aid of the constables and justices.

Persons assisting
to forfeit double
the value.

And if any tenant shall so fraudulently remove and convey away his goods or chattels, and if any person or persons shall wilfully and knowingly aid or assist him in such fraudulent conveying away or carrying off of any part of his goods or chattels, or in concealing the same, every person so offending shall forfeit to the landlord double the value of such goods, to be recovered in any court of record at *Westminster*. s. 3.

But if the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50 l., the landlord or his agent may exhibit a complaint in writing (A) before two justices of the peace of the same county or division, residing near the place where such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon (B) the parties concerned, examine the fact and all proper witnesses upon oath (or if it is a quaker, upon affirmation required by law), and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged, and to enquire in like manner of the value of such goods and chattels; and upon full proof of the offence, by order (C) under their hands and seals the said justices shall adjudge the offender or offenders to pay double the value of the said goods and chattels, to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint: and if the offender or offenders, having notice of such order, shall refuse or neglect so to do, they shall by their warrant (D) levy the same by distress: and for want of such distress (E) may commit the offender or offenders to the house of correction (F), there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied. s. 4.

T. 29 & 30 G. 2. K. and Biffex. Order made by two justices, reciting that a complaint had been made to them in writing, by *A. Clavey* against *J. Biffex*, that he the said *Clavey* demised his estate in the parish of *Shelley* in the county of *Somerset* to *William Thatcher*, at the yearly rent of 44 l. and that there was due and in arrear from *Thatcher* to him for rent of the said estate, on the fifth day of *April* last, 24 l. 15 s. 8 d.; and that he the said *Clavey* would have distrained the goods and chattels of the said *W. Thatcher* upon the said estate, in order to obtain satisfaction of the said rent; but to prevent him from so doing, the said *Biffex*, on or about the 27th, 28th, and 29th days of *August* last, did

did knowingly and wilfully aid and assist the said *Thatcher*, in fraudulently conveying and carrying off from the said estate his the said *Thatcher's* goods and chattels, and also in concealing the same, being under the value of 50 l., that is to say, two cows, one heifer, and ten hundred weight of cheese, of the value of 20 l.; whereby the said *Clavey* was prevented from distraining the same, in order to obtain satisfaction for the said rent, and contrary to the statute 21 G. 2.; and therefore praying us to grant him our warrant of summons, requiring you the said *J. Biffex* to appear before us, and that we would examine the fact, and thereupon make such order therein for his relief, as the said statute directs and requires, and as should be agreeable to justice: Whereupon we the said justices, residing near the said estate from whence the said goods and cattle were removed, and neither of us any way interested in the said estate, did issue our warrant of summons, requiring you the said *J. Biffex* to attend us thereon to answer the said complaint; and you having attended accordingly, and we in your presence having examined the witnesses produced by the said *A. Clavey* upon oath, and heard what was alleged by you in your defence, do adjudge that the said complaint is true; and that the said goods and cattle of the said *W. Thatcher*, which you so aided and assisted in conveying and carrying off from the said estate, and also in concealing the same, were of the value of 20 l. and that you have thereby forfeited double of the value of the said goods and cattle, being the sum of 40 l., to the said complainant *A. Clavey*, by virtue of the said statute: We therefore, in pursuance of the said statute, do adjudge, order and require you the said *J. Biffex*, within the space of three days from the date hereof, to pay to the said *A. Clavey* the sum of 40 l., which if you shall neglect to do, such further proceedings will be then had against you to enforce the payment thereof, as the said statute directs and requires. Given under our hands and seals this fifth day of *January* 1756 — This order was affirmed by the sessions upon appeal. Both the orders were removed by *certiorari* into the king's bench. It was moved to quash the same. Objections taken: 1. The complaint is said to be taken in writing, but not upon oath. 2. It is only said, that he demised to *W. Thatcher*; but not said for what estate or term. 3. It is stated, so much was due for rent, but not said for what term; it might be due 20 years ago: It is not stated to be due, when *Thatcher* removed his goods. 4. The words of

the order are, goods and cattle; of the statute, goods and chattels. 5. No certain time is alledged when the defendant aided and assisted; only said, on or about the 26th, 27th, or 28th of August. 6. Not stated that *Thatcher* did carry off his goods: only that *Biffex* did aid and assist him in carrying them off. 7. They adjudge the complaint true, but do not state the evidence: and this is a conviction, not an order: and for any thing that appears, it might be upon *Clavey's* evidence alone. 8. It is not stated that the goods were under the value of 50 l., which is the ground of the justices jurisdiction. 9. The words of the statute are, if any person shall be a tenant of any lands, tenements, or hereditaments: the word used in the order is *estate*; which may be a thing incorporeal, or may mean the interest in the land, and so not within the statute. 10. It should appear, whether the landlord has a right to distress: by the 8 *An. c. 14.* the landlord may distress at any time within six months after the expiration of the term: it doth not appear these six months were not expired; and if they were, this is no offence.——After consideration, Mr. *J. Denison* delivered the resolution of the court: I think the most material objection is, whether this is an order or a conviction. If a conviction, the evidence ought to have been set out. And there has been no doubt (notwithstanding the case of *K. and Pulline*, 1 *Salk.* 369.) that in a conviction the evidence must be set out, that the court may judge upon it. So it was held by *L. Hardwicke* in the case of *K. and Lloyd*, *Str.* 996. and in that case it was objected, that as it subjected the party to a penalty, though in the statute it was called an order, yet it should be construed as a conviction: but the court said, every act of the justices, which subjects the party to a penalty, shall not be construed as a conviction. *K. and Venables*, *Str.* 630. 2 *L. Raym.* 1406. upon the statute for licensing alehouses, considered as an order. *K. and Blackwell*, *M. 4 Geo.* which the court said was a strong case, and must be considered as an order. I understood from my *L. Hardwicke*, in the case of *K. and Lloyd*, that his ground of the difference was founded upon the expressions of the statute, and not upon the penalty; as where the words of the statute are, “of which he shall be convicted,” it is to be construed as a conviction. Here it is extremely strong; the statute calls it an order: and in the nature of it, it is an examination upon a complaint. If the party was never summoned, this court upon affidavit will grant an information against the justices; but the summons

summons need not be set out; and the court will intend the justices have done right, in case the contrary does not appear upon the face of the order. As to the 1st objection: this is not an information, but a complaint: when the party is summoned, the witnesses are to be examined upon oath, but the complaint need not be upon oath. In answer to the 2d objection: as the order has followed the words of the statute, we will not intend it a case wherein the justices had not a jurisdiction. The court will not, in case of an order, intend that the justices have done wrong. As to the 3d objection: it is sufficiently alledged, in an order; his assisting the tenant to carry away the goods, as it is here alledged, is sufficient to shew the rent continued then to be in arrear; and the rather, as the defendant might have availed himself of the rent paid, by proving it before the justices. I much doubt, whether in a declaration it would not be sufficient to say, the rent was in arrear at such a day; and I think it would lie upon the defendant to prove that the rent does not remain in arrear. As to its not being said, for what time the rent was due; this is mere matter of form. As to the 5th objection: *about*, in common parlance, means in this case three days or near it. They might be three days in carrying the goods away. The days are not material, even in legal proceedings. 1 *L. Raym.* 581. And in the case of *K. and Simpson, H. 3 Geo. 2. Str.* 46. (a) the day and hour in a conviction are not material. By this statute no time is limited when the complaint shall be made: it may be made at any time. Suppose that the defendant had paid the penalty on a different complaint made, he might easily have shewn it. As to the 6th, the answer is obvious: If *Thatcher* had not carried his goods away, the defendant could not have aided in carrying them. The statute makes two offences; one, carrying the goods away; the other, aiding in carrying them away. It is only necessary here to state the offence which the defendant had been guilty of, which this order does in the words of the statute. In the case of *K. and Monk, M. 13 Geo. 2.* there was a conviction for aiding and assisting in killing a buck. It was objected, that it was not charged the buck was killed. But the court held, that as the conviction was in the words of the statute, it was sufficient. And the court held they were all principals, as well those that killed the buck, as those that assisted.

(a) See tit. CONVICTION.

And

And this was the case of a conviction.—All the other objections may have this general answer; that in the case of orders, where the justices have jurisdiction, we will intend they have acted right; and if they have done wrong, they may be punished by an information.—Let the orders be confirmed. *MS.*

So in the case of *K. and Middlebush*, T. 30 & 31 G. 2. Two justices make an order against one *Thomas Middlebush*, for wilfully and knowingly aiding or assisting *John Chesterton*, the tenant of Sir *Thomas Fleetwood*, in fraudulently removing and conveying away five cows and other goods, or in concealing the same. Which order, on appeal to the sessions, was confirmed. It was moved to quash these orders, upon two objections: 1. The whole adjudication refers to the complaint of one *Thomas Weston*, wherein there is no charge upon *Chesterton* the tenant at all: neither is it stated, that *Chesterton* the tenant did remove the goods. 2. The act creates two offences, viz. assisting in removing, and assisting in concealing the goods. Now, it is not specifically charged upon the defendant *Middlebush*, that he wilfully and knowingly did either of these two things: It is only alledged that he wilfully and knowingly did one or the other. In 1 *Salk.* 374. *Rex v. Stecker*, an indictment for forging, or causing to be forged, was holden ill, because the charge was in the disjunctive. So, 2 *Haw.* 225. An indictment charging a man disjunctively, is void. For the offences are distinct; and it appears not, of which of them the defendant is accused. So here, it doth not appear, of which of the two offences the justices have convicted him.—On a rule to shew cause, To the 1st objection, that it is not described sufficiently what the offence is; it was answered, that this is an order, and the court will not intend it to be ill. To the 2d objection, as to the charge being in the disjunctive, that he assisted the tenant in removing or concealing the goods, it was answered, that the crime and the punishment are the same upon both; and the defendant was heard.—By *L. Mansfield* Ch. J. Upon indictments it hath been determined, that an alternative charge is not good (as, forged or caused to be forged); though one only need be proved, if laid conjunctively (as, forged and caused to be forged); but I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect. But this is an order: and being good in substance, needs not be literally so strict.—And by the court, the rule

to shew cause was discharged, and consequently both orders affirmed. *Burr. Manif.* 399.

H. 22 G. 3. K. v. Morgan. Two justices of the county of *Hereford*, convict *John Morgan* of *Michael Church* in the said county, of knowingly and wilfully aiding and assisting *John Morris* of *Llanbader Painscastle*, in the county of *Radnor*, in fraudulently and clandestinely removing and conveying away certain goods and chattels, not exceeding the value of 50 l. from off the farm of *Painscastle*, &c. and in concealing and secreting the said goods and chattels at *Michael Church* aforesaid, to prevent the landlord distraining the same for rent; and the said justices order the said *John Morgan* to pay 42 l. being double of the value of the goods and chattels so taken away and concealed.—It having been objected at the sessions, that it appeared upon the face of the conviction, to have been made by two justices of the county in which the goods were found, the sessions quashed the conviction for want of jurisdiction in the justices.—*Willes J.* intimated, and it seemed to be agreed by the court; that the statute gave an authority to the justices of the respective counties within which either offence under this act was proved to have been committed. But the court thought that the conviction was bad, as no evidence was stated in it, and as no special case was returned: they held, that it must be taken, that the conviction was quashed at the sessions for that defect, for that the law presumes, that an inferior jurisdiction acts rightly unless the contrary appear. *Cal. Cas.* 156.

Persons aggrieved by order of such justices, may appeal to the next general or quarter sessions; who may give costs to either party. *11 G. 2. c. 19. s. 5.* Appeal.

And where the party appealing shall enter into recognizance, with one or two sureties, in double the sum so ordered to be paid, with condition to appear at such sessions; the order of the justices shall not be executed against him in the mean time. *s. 6.*

VI. That reasonable distress shall be taken.

Distresses shall be reasonable and not too great; and he that taketh great and unreasonable distresses, shall be grievously amerced. *52 H. 3. c. 4.* Distress to be reasonable.

For example, if the lord distrain two or three oxen for 12d. or the like small sum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12d.;

Distress.

12 d. ; of his own shewing, he shall make fine: or the party may have his action upon this statute. 2 *Inst.* 107.

If the lord distrain an ox, or horse, for a penny; if there were no other distress upon the land holden, the distress is not excessive: but if there were a sheep, or a swine, or the like, then the taking of the ox or horse is excessive, because he might have taken a beast of less value. *Id.*

VII. Manner of taking distress.

Breaking gates.

Gates or inclosures may not be broken open, nor thrown down, to make a distress. 1 *Inst.* 161.

Opening doors.

Nor may the lessor enter into the tenant's house, unless the doors are open. *Read. Distr. 2 Bac. Abr.* 111.

Upon a question about taking a distress, it was held by the L. Ch. J. *Hardwicke* at the summer assizes at *Exeter* 1735, that a padlock put on a barn door could not be opened by force, to take the corn by way of distress, 9 *Viner*, 128.

But if the outer door of an house is open, one may break an inner door to take a distress. *Cases in the time of lord Hardwicke.* 168. *Buller's Ni. Pr.* 81.

But by 11 G. 3. c. 19. where goods are fraudulently or clandestinely carried off the premises, and are locked up in any house or place, the landlord (calling a constable to his assistance, and in case of a dwelling house, oath being also made before a justice, of his ground of suspicion), may break open in the day time, such house or other place, and seize such goods. *s.* 7.

But except it be in this case where the goods are clandestinely conveyed, it may seem from what hath been said, that the landlord hath no mean to come at the goods in order to make distress, if the tenant shall think fit to lock up his gates, and shut the doors,

Part in the
name of the
whole.

If a landlord comes into a house, and seizes upon some goods as a distress, in the name of all the goods of the house; that will be a good seizure of all. 6 *Mod.* 215.

VIII. Distress how to be demeaned.

Impounding off
the premises.

By the 52 H. 3. c. 4. None shall cause any distress that he hath taken, to be driven out of the county where it was taken: and if one neighbour do so to another of his own authority (as for damage feasant, or rent charge, 2 *Inst.* 106.) he shall make fine as for a thing done against the peace; and if
its

the lord so presume to do against the tenant, he shall be grievously punished by amerciamen.

Before this act, at the common law, a man might have driven the distress to what county he pleased; which was mischievous, for two causes: 1. Because the tenant was bound to give the beasts being impounded in an open pound sustenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2. He could not know where to have a replevy: but the party was, before this statute, driven to his action upon his case. *2 Inst.* 106.

And albeit this statute be in the negative, yet if the tenancy be in one county, and the manor in another county, the lord may drive the distress which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the said mischiefs: for the tenant by doing of suit and service to the manor by common intendment may know what is done there, and therefore may give his beast sustenance. And to know where to have his replevy, the bailiff of the manor usually drives the cattle distrained to the pound of the manor. And hereby it is to be noted, that a case out of the mischief, is out of the meaning of the law, tho' it be within the letter. *Id.*

And by the 1 & 2 P. & M. c. 12. It is further enacted, that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lath, where such distress shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress was taken; and no cattle or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner may be constrained to sue several replevies; on pain of 100 s. to the party grieved, and treble damages. c. 1.

T. 21 G. 2. *Gimbart and Pelah.* The defendant justified impounding cattle damage feasant. And on evidence it appeared, he put them into the next pound, though it happened to be in another county. And *Lee Ch. J.* held, it did not make him a trespasser, though it subjected him to the penalty of the statute of the 1 & 2 P. & M. Str. 1272.

Cattle may be impounded in a pound overt (a) or publick pound, or on the premises, where the owner may give

Cattle, &c. how to be impounded.

(a) By pound overt is meant an open pound, as a publick pinfold made for that purpose, or an open field, where the

owner

give them meat and drink without trespass to any other, in which case they must be sustained at the peril of the owner. But if they are put in a pound *covert*, as in a house, or private pound, the distrainer must keep them with meat and drink at his peril, and for which he shall have no satisfaction. 1 *Inst.* 47.

Dead goods how
to be impounded.

But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house, or other pound *covert*, within three miles in the same county; for if he impound them in a pound *overt*, he must answer for them. *Id.*

Impounding on
the premises.

By 11 G. 2. c. 19. Any person distraining, may impound or otherwise secure the distress, of what kind soever it be, in such place, or on such part of the premises, as shall be most convenient; and may appraise, and sell the same, as any person before might have done off the premises. *f.* 10.

Using the goods
distrained.

Cattle distrained may not be worked or used, unless for the owner's benefit, as a cow milked, or the like; much less may they be abused or hurt. *Cra. Jac.* 148.

And it hath been said in this case, that even a cow may not be milked; for tho' the cow be better for this, yet he who took the distress ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, yet he who took the distress may distrain again. 2 *Bac. Abr.* 112.

Distress dying.

So if the distress be lost by the act of God: as if the distress dies in the pound, without any default in the distrainer; in such case, he who made the distress may distrain again. 1 *Salk.* 248.

Killed.

It is the distrainer's own fault, if he puts the distress in a pound which will not hold it; but he cannot justify the tying of cattle in the pound; and if he ties a beast, and it is strangled, he must pay damages. *Id.*

IX. Of rescous and pound breach.

Rescous and
pound breach.

By the common law, if a man break the pound or the lock of it, or part of it, he greatly offendeth against the

owner may go to his goods without trespass. And by pound *covert* is meant a place covered or close, as a house or place where the goods are locked up or secured, where he cannot go to them at his pleasure.

peace,

peace, and doth trespass to the king, and to the lord of the fee, and to the sheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of justice; and therefore hue and cry is to be levied against him, as against those who break the peace. *Mir. c. 2. f. 26.* And the party who distrained may take the goods again, wheresoever he shall find them, and impound them again. *1 Inst. 47.*

And by statute, on any pound breach or rescous, of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession. *2 W. c. 5. f. 4.*

Treble damages] In the case of *Frish v. Purvis*, *M. 34 G. 3.* The court said, that a tender after the impounding the distress, was insufficient to prevent recovering treble damages. *Durnf. and East, 5 V. 432 (a).*

Treble damages and costs] In the case of *Sir Wilfred Lawson v. Storey*, *M. 6 W.* It was adjudged, that the costs shall be trebled as well as damages. *L. Raym. 20.*

When a man hath taken distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner; if he that took the distress demand them of the owner, and he deliver them not, this is rescous in law. *1 Inst. 161.*

X: Replevying the distress.

It is worthy of observation, how provident the law Replevy, is, that men's beasts, cattle, or other goods, be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy (or taking back the pledge): otherwise the husbandry of the realm, and men's other trades, might be overthrown or hindered. *2 Inst. 137.*

To which purpose, it is enacted by the *1 & 2 P. & M. c. 12.* that the sheriff of every county shall, at his first county day, or in two months after he hath received his patent of office, appoint and proclaim in the shire town four deputies at the least, dwelling not above 12 miles one distant from another, to make replevies; on pain of

(a) See this case more at large under the head *For what causes distress shall be taken.*

Distress.

§ 1. for every month that he shall lack such deputy or deputies, half to the king, and half to him that shall sue in any court of record. *f. 3.*

And the *sheriff, or other officer*, having authority to grant replevins, shall in every replevin of a distress for rent; take in his own name, from the plaintiff and two sureties, a bond in double the value of the goods distrained, to be ascertained on the oath of one witness, and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case a return shall be awarded; before any deliverance be made of the distress; and the sheriff shall assign such bond to the *avowant, or person making cognisance.* 11 G. 2. c. 19. s. 23.

Sheriff or other officer] T. 18 G. 3. *Richards and Allen.* A rule was made on *Joseph Garmeson* the replevin clerk, *Robert Jeffreys* the under-sheriff, and *Edward Pembury* the clerk of the county court, to discover the names of the pledges taken upon granting the replevin in this cause, and to shew cause why they should not pay the defendant 57 l. 15 s., being the damages and costs recovered by him in this cause, together with the costs of the application. The distress was for rent; and on replevin brought the defendant had a verdict with the damages and costs above-mentioned. On application to *Garmeson* for the names of the pledges, he from time to time evaded and delayed so doing; having it was supposed taken none, or at least insufficient sureties; and being (as it was sworn) attorney for the plaintiff in this action. On shewing cause, *Garmeson* made an affidavit of his illness and inability to do any business. The under-sheriff and county court clerk shewed for cause, that they were intirely ignorant of this matter, having nothing to do with the replevin clerk, who was appointed by the high-sheriff in pursuance of the statute. The court enlarged the rule to a further day; and ordered the high sheriff to be added; when it was held, that as well the high-sheriff and under-sheriff as the replevin clerk (who is their deputy) are answerable to the defendant in replevin for the sufficiency of the pledges. They therefore discharged the rule against the county court clerk, but with regard to the high and under-sheriff, and the replevin clerk, they made the rule absolute. *Black. Rep.* 1220.

To the avowant or person making cognisance] *Avowry* is, where one takes a distress, and the person distrained sues a replevin; then he that took the distress must *avow* and justify in his plea, for what cause he took it, if he took it in his

his own right; and this is called an *avowry*: if he took it in the right of another, then, when he hath shewed the cause, he must make *consuance* of the taking, as bailiff or servant to him, in whose right he took it. *Terms of the L.*

And the sheriff having taken bond from the plaintiff in replevy as aforesaid, he ought forthwith to make deliverance of the goods or cattle distrained; and if the distress be drawn into a house or other strong hold, the sheriff or his bailiff, after demand made for deliverance of the distress, may break open the house to replevy them; For tho' a man's house is privileged by common law for himself, his family, and his own goods, so that the sheriff cannot break it open to attach any of them in a civil action at the suit of a private person, yet a man's house could not privilege or protect the goods of another person unjustly taken, so as to prevent the officer to make replevin; because the privilege and security of a man's house could but protect his own goods. 2 *Inst.* 140.

XI. Sale of the distress.

Distress taken for an offence presented in the leet, may sale of common right be sold, because it is a court of record; but otherwise it is, of distresses in courts that are not of record. 12 *Mod.* 330.

So a distress for an amercement in a court baron cannot be sold; but in such case a distress infinite shall go. 1 *Bulst.* 52, 53.

In like manner, before the statute of the 2 *W. Jeff.* 1. c. 5. distress for rent in arrear could not be sold, but only detained till payment of the rent: But by the said statute it is enacted, that *whereas the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby: therefore from henceforth, where any goods shall be distrained (1) for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant, or owner of the goods distrained, shall not within five days next after such distress taken, and notice (K) thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken, cause the goods and chattels so distrained*

to be appraised by two sworn (L) appraisers (whom such sheriff, under-sheriff, or constable, shall swear) to appraise (M) the same truly according to the best of their understanding; and after such appraisement, shall sell the same for the best price can be gotten for them, for satisfaction of the rent, and charges of the distress, appraisement, and sale; leaving the overplus (if any) with the sheriff, under-sheriff, or constable, for the owner's use. 2 W. sess. 1. c. 5. s. 2.

Shall not within five days] *M. 13 G. Griffin and Scott.* Trespass for entering his house, and keeping possession of his goods eight days. The defendant justifies under a distress for rent. But by the court: The defendant ought to have removed the goods at the five days end; and for the other three he is a trespasser, and there is no justification. *Str 717.*

E. 28 G. 3. Wallace against King and others, in the Common Pleas.—This was an action on the case for selling goods distrained for rent in arrear, before five days had expired after the distress was taken, and notice given. It appeared at the trial before *L. Loughborough* at the sittings at *Westminster*, that the goods were distrained on *Saturday* the 12th *May* 1787, an inventory made, and regular notice of sale given. On *Thursday* afternoon *May* 17th, the goods were removed and sold. — His *Ldp.* ordered a verdict to be entered for the plaintiff, and that the court should be moved for a rule to shew cause why the verdict should not be set aside and a nonsuit entered.—A rule having been obtained, on hearing the cause, the court said, the five days allowed before a distress can be sold are *inclusive* of the day of sale; and that on the *Thursday* afternoon, five days from the time of distress had completely expired.—Rule absolute. *Cal. by H. Black, 1 V. 13.*

The constable of the hundred, parish, or place, where such distress shall be taken] *T. 7 W. Walter and Rumbald.* The tenement whereupon the distress was made, lay part in the hundred of *Kinasley* in *Wiltshire*, and part in the hundred of *Andover* in the county of *Southampton*; and part of the distress was taken in *Kinasley*, and part in *Andover*; and all impounded together in the hundred of *Kinasley*; and the constable of *Kinasley* administered the oath to the appraisers for the whole, in the presence of the constable of *Andover*. It was objected, that the goods which were taken in *Andover* ought to have been impounded, appraised, and sold in *Andover*; and that the constable of *Andover*, tho' present in *Kinasley* when the appraisement was made, had no jurisdiction there, so that the whole was done solely by the constable

constable of *Kingsley*, which therefore as to the goods taken in *Andover* was void. But by the court; the chasing the distress over into the other county, is a continuance of the taking the distress; and the party, since it was for one entire cause, cannot sever the distress, but ought to chase them all together, and impound them in one pound. *L. Raym.* 53.

By the 1 & 2 P. & M. c. 12. No person shall take for keeping in pound, or impounding any distress, above 4 d. for any one whole distress: and where less hath been used, there to take less; on pain of 5 l. to the party grieved, besides what he shall take above 4 d. *f.* 2.

Fee for impounding.

XII. Irregularity in the proceedings.

Where any distress shall be made, for any kind of rent justly due, and any irregularity shall be afterwards done by the party distraining, or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover satisfaction for the special damage, in an action of trespass or on the case; and if he recover, he shall have full costs. 11 G. 2. c. 19. *f.* 19.

Irregularity;

But no tenant shall recover on such action, if tender of amends hath been made before the action brought. *f.* 20.

XIII. Landlord re-entering on nonpayment.

In case where an half year's rent shall be in arrear, and the landlord or lessor hath right by law to re-enter for nonpayment thereof; he may, without any formal demand or re-entry, serve a declaration in ejectment; and on recovering judgment and execution, shall hold the premises discharged from the lease. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he shall not have an injunction against the proceedings at law, unless he shall bring the arrears into court, and also the costs taxed in the said suit. Provided, that if the tenant shall, before the trial in ejectment, pay all the arrears and costs, the proceedings on the ejectment shall thenceforth cease. 4 G. 2. c. 28. *f.* 2, 3, 4.

Re-entering;

XIV. Case of tenant holding over.

Tenant holding
over after the
term is expired.

1. By the 8 Ann. c. 14. Whereas tenants *pur autre vie* (that is, holding during the life of another person), and lessees for years, or at will, frequently hold over after the determination of the lease; and whereas after the determination of such, or any other leases, no distress can be made for arrears of rent that grew due on such leases before the determination thereof; it is therefore enacted, that it shall be lawful to distrain after the determination of such lease, in the same manner as if it had not been determined: provided, that the distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrear became due. *s. 6, 7.*

And after hav-
ing received no-
tice to quit, to
pay double
value.

And by the 4 G. 2. c. 28. If any tenant for life or years, or other person who shall come into possession by, from, or under him, shall wilfully hold over any lands, after the determination of such term, and after demand made; and notice in writing given for delivering the possession thereof; he shall, for the time that he shall so hold over, pay double the yearly value thereof, to be recovered by action of debt, in any court of record. *s. 1.*

After the determination of such term, and after demand made, and notice in writing given] E. 16 G. 3. Cutting and Derby. On an action for double value of the farm, it appeared, that the plaintiff on the 30th of September, and again on the 7th of October, gave a written notice to the defendant to quit the premises on the 10th of October then following, being the day on which the lease would expire. It was objected, that by the statute the notice ought to be *after* and not *before* the expiration of the term. But by the court, notwithstanding the order in which the words are placed in the act of parliament, it is evident that the notice ought to be previous; otherwise it would be absurd, and impossible to be complied with, to require *after* the expiration of the term that the tenant should quit *at* the expiration. This statute, and the 11 G. 2. c. 19. being *in pari materia* ought to have the same construction; and where, by the latter the tenant is to be bound by his own notice to quit, that must be clearly previous. *Black. Rep. 1075.*

E. 6 G. 3. Tasker and Burr. The landlord demised to the tenant from year to year, commencing the 10th of October,

October, being old *Michaelmas-day*. The tenant dies on the 27th of *August*. The landlord, on the 9th of *September*, gives notice to the executor to quit at the end of the term. The question was, If this notice is sufficient? The court held clearly, that in a common case, it would not be sufficient notice; but in the case of an executor, they doubted. But L. *Mansfield* inclined strongly, that the nature of the contract being to hold from year to year, unless reasonable notice was given on either side, and notice not having been given in reasonable time; the executor was bound to keep the farm, if required, another year: And therefore on the other hand, is at liberty to keep it if he chooses it. *Black. Rep.* 596.

M. 19 G. 3. *Dagget and Snowden*. In the common pleas. On the 5th of *October* 1769, a written memorandum was entered into, whereby the plaintiff agreed to let to the defendant a farm, to hold the arable ground from old *Candlemas* then next, the pasture from old *Lady-day*, and the meadow from old *May-day*, for seven years from the said days and times, paying rent half yearly, at old *Michaelmas* and *Lady-day*. In *September* 1777, the plaintiff gave the defendant a written notice to quit the arable land at old *Candlemas* next, the pasture at old *Lady-day*, and the meadow ground at old *May-day*. The question was, Whether this notice was sufficient to entitle the plaintiff to recover the whole, or any part of the premises? For the defendant it was argued, that this was not a sufficient notice for any part; the whole being one entire tenancy; and therefore notice to quit ought to have been given on the 13th of *August*, being six months previous to the time when the first part of the term expired. But by the court, The notice was sufficient for the whole. It was settled by all the judges about ten years ago, to avoid diversity of opinions, and for general convenience, that in tenancies from year to year (which these kinds of holding over are held to be) there must be six months notice on either side to quit according to the ancient law; except where any special agreement, or the custom of any particular places, intervenes. The true construction of this agreement is, that it is a holding from *Lady-day* to *Lady-day*, the rent being payable at *Michaelmas* and *Lady-day*. And tho' part of the farm is to be entered upon and quitted at old *Candlemas*, and other part not till old *May-day*, yet that is no more than the custom of most countries would have directed, without any special words for that

purpose, in a taking from old *Lady-day*. *Black. Rep.* 1224.

M. 26 G. 3. Messenger v. Armstrong. Action for double rent: The first count of the declaration stated that the plaintiff, at *Whitsuntide* 1781, demised a messuage and tenement to the defendant for three years at 5*l.* 5*s.* *per annum*. That the plaintiff, before the determination of the lease, gave the defendant notice to quit at *Whitsuntide* 1784: That the defendant held over, and that double rent became due from *Whitsuntide* 1784. A second count stated another notice served on 3d *June* following, to quit at the *Martinmas* following, *or to pay double rent* — By *L. Mansfield*, Where a term is to end on a precise day, there is no occasion for a notice to quit, because both parties are apprised that unless they come to a fresh agreement there is an end of the lease. Here it ended at *Whitsuntide*; the landlord before the time expired, told the tenant, “you know you are to quit,” the meaning of that is, “If you do not quit, I will insist on my double rent.” And he gave him a second notice afterwards, wherein he said in so many express words what was before to be collected by intendment. There is no colour for the motion. *Per Cur.* Rule discharged. *Durnf. and East,* 1 V. 53.

But after all, this remedy by action seemeth not altogether adequate to the evil; for three reasons. 1. Because such action is certainly tedious and expensive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into possession, is not obtained by such action, but for that he shall be still to seek. A more short and easy method of ousting the tenant of his possession, seemeth more eligible in the like cases.

Tenant holding over after having given notice to quit, to pay double rent.

Whereas great inconveniences have happened to landlords, whose tenants have power to determine their leases, by giving notice to quit the premises, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same; it is therefore enacted, that if any tenant shall give notice of his intention to quit the premises at a time mentioned in such notice, and shall not accordingly deliver up the possession at the time in such notice contained, he, his executors or administrators, shall from thenceforward pay double rent, to be recovered in like manner as the single rent. 11 G. 2. c. 19. s. 18.

H. 5. G. 3.

H. 5 G. 3. Timmins and Rowlinson. In replevin, the Parol notice. landlord avows, that he demise'd the premises to the tenant for one year from the fifth of *April 1760*; that the tenant gave notice that he would quit the 5th of *April 1761*, but held over till the 10th of *October*; wherefore he avows for double rent for half a year. The tenant pleads a demise from the landlord for one year from the 5th of *April 1760*, and so from year to year as long as both parties pleased: That the demise was only by parol; and that the notice proved to be given by the tenant to the landlord to quit the 5th of *April 1761*, was only by parol likewise. The question was, Whether the tenant was liable to pay double rent for not quitting after a parol notice; and further, as he held under a parol demise, as tenant from year to year, whether this is a holding under the statute, so as to subject the tenant to double rent for not quitting after notice?—It was argued for the tenant, that the act must be confined to leases, wherein an express power is reserved to determine the tenure by notice; and to notices in writing only; because the statute speaks of the time in such notice mentioned and contained, which words are not applicable to parol notices.—For the landlord it was insisted, that this being a remedial law, the words might be fairly extended to parol leases, which are the most common, and to parol notices; without which, the clause would be nugatory, and affect only such tenants as were foolish enough to give written instead of parol notices.—*B. L. Mansfield C. J.* Statutes *in pari materia* are to be taken all as one system, to suppress the mischief. The mischief is an act of vexation, inconvenience, and injustice, by the tenant, after notice given by himself, after the landlord has another tenant ready, to stop short and say, I won't quit. This is an universal sort of holding, and therefore this practice might be a very extensive evil. The legislature, in the 4 G. 2. made a provision, where the landlord gives notice, and afterwards in the 11 G. 2. this additional provision, in case the notice comes from the tenant. The two laws are only parts of the same provision. It is said, the notice must be in writing. Why? Does the act say so? No. But the act of 4 G. 2. does. That is the strongest reason against it. It is here purposely omitted. The drawer of the act could not leave it out by accident, having the other act before him. As to the words mentioned and contained; may not that be in a parol notice? Certainly it may. I therefore think this is a case within the mischief, the preamble, and the en-

actings words of the statute. — *Wilmot J.* (the other two justices being absent) : As to the notice being in writing, the different penning of the acts furnishes evidence of different intentions. The 4 G. 2. seems to respect chiefly leases for lives or for long terms of years; and if the tenant holds over, and the landlord gives notice in writing for him to quit, he shall recover not double rent (for that might not be an equivalent) but double the yearly value of the estate : And for that reason it was necessary, that it should be recovered by action, and not by distress. There are two good reasons why one should be in writing, and the other not. First, if the tenant gives such notice as will justify his leaving the farm, and doth not leave it, that is the mischief which the act meant to meet; and parol notice is sufficient for that. Secondly, landlords generally can write: tenants in the country very seldom can. This case is within the preamble and the enacting words; but, had the preamble been confined, I should have been for extending the remedy according to the enacting words. These tenancies are the most usual of any. It hath almost extinguished tenancy at will, which by reason of the inconveniencies that would otherwise ensue to both parties, is not now to be understood as determinable at pleasure, but for a year certain, which was better, but still inconvenient; to turn out or quit at the end of the year, without notice. This produced the present rule, that landlords and tenants shall mutually give reasonable notice. What is reasonable, is matter of circumstances. This brings the present lease within the words of the act. They have power to quit and determine, upon giving reasonable notice. — And judgment was given for the landlord. *Black. Rep.* 533 *Burr. Mansf.* 1603.

But this remedy, in like manner as the former, seemeth not apposite to the main purpose. The statute proceeds upon a supposition that the tenant is a man of substance: which probably may not be the case. It is most likely, that if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him. The putting him out of possession, by some expeditious and easy method, seemeth the more adequate remedy in this case also, in like manner as is provided in the case where the tenant deserteth the premises, as hereafter followeth.

E. 26 G. 3. In the case of *Right v. Darby* and another, *L. Mansfield* said, That when a lease is determinable on a certain event, or at a particular period, no notice to quit

Tenant from year to year is to have half a year's notice to quit.

is necessary, because both parties are equally apprized of the determination of the term. But if there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract: They are supposed to have renewed the old contract which was to hold for a year; and in that case it is necessary for the sake of convenience, that if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next, or any following year. *Durnf. and East. 1 V. 159.*

But in the case of *Goodright v. Cordwint, E. 35 G. 3.* it was determined; That if a landlord receive rent due after the expiration of the notice to quit, it is a waiver of that notice: In this case, the landlord gave the tenant notice to quit at old *Michaelmas* 1792; and afterwards received a half year's rent due on 5th *April* 1793. *Durnf. and East, 6 V. 219.*

Receiving rent after notice is a waiver thereof,

XV. Attorning to strangers.

Whereas the possession of estates is rendered precarious, by tenants attorning to strangers; it is enacted, that all such attornment shall be void; unless the same be made pursuant to some judgment at law or decree in equity, or be with the consent of the landlord, or be to a mortgagee after the mortgage is become forfeited. 11 G. 2. c. 19. s. 11.

Attorning to strangers,

And tenants to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to the landlord; on pain of forfeiting to him three years value of the rent; and the landlord may make himself defendant by joining with the tenant, or may appear by himself. s. 12, 13.

And if the tenant shall not give notice to the landlord, and the plaintiff shall obtain judgment against him by default; the court, on application, will set aside the judgment, and order the tenant to pay the costs. *Burr. Mansf. 1996.*

XVI. Deserting the premises.

If any tenant at rack rent, or where the rent reserved shall be full three fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the premises, and leave the same uncultivated or unoccupied,

Tenant deserting.

unoccupied, so as no sufficient distress can be had; two justices (having no interest in the premises) may, at the request of the landlord, go upon and view the same, and affix on the most notorious part of the premises, notice (N) in writing, what day (at the distance of 14 days at the least) they will return to take a second view: and if on such second view, the tenant shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the justices may put the landlord into possession, and the lease as to such demise shall from thence be void. 11 G. 2. c. 19. s. 16.

But the tenant may appeal to the next justice or justices of assize; who may award costs to either party. s. 17.

XVII. Rent in case of an extent or execution.

Extent or execution.

In the case of *K. and Cotton, T. 1755*, it was determined by the barons of the exchequer, and affirmed on a writ of error, that if a distress be made for rent, and before the five days given by act of parliament are expired an extent is issued, though it be not levied, for a debt due to the crown; the extent shall take place of the distress: because the distress doth not oust the property of the effects into the landlord, but is only a pledge for security in his hands for his rent.

Arrears of rent to be first paid not exceeding one year's rent.

But by the 8 *An. c. 14*. No goods being on any messuage, lands or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord or his bailiff all such rent as shall be then due for the premises, provided that it amount not to more than one year's rent; and if the said arrears shall exceed one year's rent, then the party paying such landlord one year's rent, may proceed to execute his judgment. s. 1.

And in case of two executions, there shall not be two years rent paid to the landlord: for the intent of the act was to reserve to the landlord only the rent for one year, and it was his own fault if he let more run in arrear. Therefore one year's rent to the landlord being paid to him on the first execution, the sheriff is not to levy for him again any thing on a subsequent execution. *Sir. 1024*.

XVIII. Tenant

XVIII. Tenant for life or at will dying.

Whereas where any lessor or landlord, having only an estate for life, in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion intitled thereto, other than for the use and occupation from the death of the tenant for life; of which, advantage hath often been taken by the under-tenants, who thereby avoid paying any thing for the same: for remedy thereof, where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of such under tenant, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion, of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due. 11 G. 2. c. 19. s. 15.

Rent on the death of tenant for life.

In the case of *Pugett and Gee*, Dec. 4, 1753. Tenant in tail, remainder to the defendant in fee, leases for years, and dies without issue a week before the day of payment of the half year's rent. The lessee, at the day, pays all the half year's rent to the defendant. The executor of the tenant in tail brings his bill for apportionment of the rent.——By the L. Chancellor *Hardwicke*: This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are in it two grounds for relief in equity. The first arises on the statute of the 11 G. 2. The second arises on the tenant's having submitted to pay the rent to the defendant.——The relief arising upon the statute, is, either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost. For no one was intitled to recover it. His representatives could not; because they could only bring an action for the use and

and occupation; and that would not lie where there was a lease, but debt or covenant. Nor could the remainderman; because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of the person, to whose executors the remedy is given. In the preamble, it is one having only an estate for life. In the enacting part, it is, tenant for life. Now tenant in tail comes expressly within the mischief. I do not know how the judges at common law would construe it; but I should be inclined in this court to extend it to them. I should make no doubt, were this the case of tenant in tail after possibility of issue extinct; for he is considered in many respects as tenant for life only. He cannot suffer a recovery. He may be enjoined from committing waste, such as hurts the inheritance, as selling timber; though not for committing common waste, being considered as to that as tenant in tail. Were it the case of tenant for years determinable on lives, he certainly must be included within the act, though it says only tenant for life: it would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life; for he has the inheritance in him, and may when he pleases turn it into a fee: but if he does not; at the instant of his death he has but an interest for life. Such too is the case of a wife tenant in tail *ex provisione mariti*. Upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reasons of acts of parliament? Nay, it has actually done so, on the statute of forcible entry; upon which this court grounds bills, not only to remove the force, but to quiet the possession. That act requires a legal estate in possession. This court extends the reason to equitable interest.—But I ground my opinion in this case upon the tenant's having submitted to pay the rent. He has held himself bound in conscience to pay it, for the use and occupation of the land the last half year. He paid it to the defendant, which he was not bound to do in law. And in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity intitled to it. The division must be that prescribed by the statute;

statute ; and then the plaintiff is intitled to such a proportion of the rent as accrued during the testator's life.— And accordingly it was decreed. M. S.

In the case of *Doe* on the demise of *John Shore* against *Porter*, H. 29 G. 3. it was determined, that in the case of a tenant from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land, that the intestate would have had, if he had been living. *Durnf. and East*, 3 V. 13.

Tenant at will dying.

XIX. Rent how far recoverable by executors or administrators.

By the 32 H. 8. c. 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, fee tail, and for term of life, of rents services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due to their testators in their lives, and yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have action to levy the same, it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due and not paid at the time of his death, may have an action of debt for the same, against the tenant who ought to have paid the same, or against his executors and administrators; or may distrain upon the premises, so long as they continue in the possession of such tenant in demesne, who ought immediately to have paid the same to the testator in his life, or of any other person claiming the same only by and from such tenant by purchase, gift, or descent. s. 1.

Rent recoverable by executors or administrators.

In like manner the husband may have action, or distrain for arrears due in the lifetime and in the right of his wife. s. 3.

And if any person shall have any rents or fee farms for the life of any other person, which shall be behind and unpaid at the death of such other person; he, his executors or administrators, may have action of debt against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators, or may distrain for the same upon the premises in such like manner as he might have done if the person by whose death the estate was determined had been in full life. s. 4.

Note,

Note, *fee farm* is, when the lord upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of the value; without homage, fealty, or other services, beyond what are especially comprised in the feoffment: and it is called a *fee farm rent*, because a farm rent is reserved upon a grant in fee. 2 *Inst.* 44.

XX. Of distress by warrant of justices of the peace.

Making distress
and selling the
same.

By the 27 G. c. 20. it is enacted as follows: *In all cases where any justice of the peace is or shall be required or empowered by any act of parliament, to issue a warrant of distress, for the levying of any penalty inflicted, or any sum of money directed to be paid by such act; it shall be lawful for the justice granting such warrant, therein to order and direct the goods and chattels so to be distrained, to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than four days, nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid.*

Breaking open
doors, &c.

Levying any penalty] It may be observed in cases of distress for the levying of penalties, that there seems to be no power to break open doors or gates, in case they are locked up or shut, unless such penalty or part thereof be given to the king. Which matter may seem to require some consideration.

Charges of tak-
ing, keeping,
and selling.

And the officer making such distress, shall and may deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by such sale; and the overplus (if any) after such charges, and also the said penalty or sum of money, shall be satisfied and paid, shall be returned on demand, to the owner of the goods so distrained: and the officer executing such warrant, if required, shall shew the same to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

Quakers except-
ed.

But this shall not extend to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called Quakers, contained in the acts of the 7 & 8 W. c. 34. and the 1 G. ft. 2. c. 6.

No replevy lies.

Order and direct the goods to be sold] And in this case no replevy lies: the sheriff having no power to examine the proceedings of the justices. 1 *Barnardist.* 110. Str. 1184.

Officers

Officers may deduct the reasonable charges] But here is no power given to the justices to ascertain such charges; therefore it seemeth, that the officer executing the warrant shall be the sole judge thereof in the first instance, and afterwards, if the owner of the goods distrained shall be dissatisfied, the reasonableness thereof shall be determined by a judge and jury upon an action brought.

But by special statutes, this power of ascertaining the charges of distress and sale is sometimes given to the justices, as is set forth in this book under the respective titles.

Tithes and church rates by the people called Quakers] The abovesaid statutes of the 7 & 8 W. c. 34. and 1 G. B. 2. c. 6. relate not only to *tithes and church rates* (by which last seemeth only to be understood the churchwardens rate for the repair and other uses of the church), but also to any customary or other rights, dues, or payments, belonging to any church or chapel, which of right by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel. Therefore, for any thing that appears from the words of this statute, unless it be in the case of *tithes or church rates*, the justices may order the distress for those other dues and payments to be detained for a certain time, and the officer may deduct the charges not only of *distraining*, but also of *keeping* and *selling* the distress; whereas by those former acts above mentioned, the officer was only allowed to deduct the necessary charges of *distraining*.

Quakers' tithes
and church
rates.

And whereas warrants of distress are sometimes ineffectual, by reason of the goods of the offenders being out of the jurisdiction of the justice granting the same, it is enacted, that in all cases where any penalty, forfeiture, fine, or other money is directed by warrant of any justice to be levied by distress and sale of the goods of any person; if sufficient distress cannot be found within the limits of the jurisdiction of such justice; on oath thereof made by one witness, before one justice of any other county or place (which oath shall be by him certified by indorsement on such warrant), such penalty, forfeiture, fine, or other money, or so much thereof as may not have been before levied or paid, may by virtue of such warrant and indorsement be levied by the person to whom such warrant was originally directed, by distress and sale of the goods of such person in such other county or place; to be applied in like manner as if sufficient distress had been found within the jurisdiction of the justice who originally granted such warrant; and if no such distress can be

Where distress
cannot be found
in the jurisdic-
tion of the jus-
tices granting
warrants, it may
be levied in any
other place.

found, such offender may be proceeded against according to law.
33 G. 3. c. 55. f. 3.

Provided that no justice who shall indorse any such warrant as aforesaid, shall be answerable for any irregularity which may have been committed in or about the granting thereof. Id.

The eight precedents next following, drawn and communicated to the author by a gentleman of great learning and judgment, acting in the commission of the peace (a), are inserted, not only as useful in this place, but as patterns for our imitation in other like cases.

A. Complaint to be exhibited in writing before two justices, in the case of goods clandestinely removed; on the 11 G. 2. c. 19.

Westmorland. **B**E it remembered, that this — day of — A. I. of — complaineth, that A. T. of — hath fraudulently and clandestinely removed and conveyed away certain goods and chattels of — not exceeding the value of 50l. from — at — to prevent — from distraining the said goods and chattels for arrears of rent due to the said — for the said —. And that A. O. of — yeoman, and B. O. of — yeoman, wilfully and knowingly aided and assisted the said A. T. in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same. A. L.

Exhibited at — the — day of — before us — justices of the peace of — residing near — not being interested in —.

B. Warrant thereupon to summon the parties concerned.

Westmorland. { To the constable of —

WHEREAS a complaint in writing hath been this — day of — exhibited before us — justices of the peace — residing near — not being interested in — by A. I. of — gentleman, setting forth that A. T. of — yeoman, hath fraudulently and clandestinely removed and conveyed away certain goods and

(a) The late Sir Thomas Drury, Bart.

chattels of _____ not exceeding the value of 50l. from _____ to prevent _____ from distraining the said goods and chattels, for arrears of rent due to the said _____ for the said _____. And that A. O. of _____ yeoman, and B. O. of _____ yeoman, wilfully and knowingly aided and assisted the said _____ in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same: These are therefore to command you forthwith to summon the said A. T. A. O. and B. O. to appear before us at _____ on the _____ day of _____ at the hour of _____ to answer the matter of the said complaint. Given under our hands and seals at _____ the _____ day of _____.

C. Conviction, upon 11 G. 2. c. 19. s. 3. of a tenant for fraudulently removing his goods or chattels, or other person for knowingly assisting him therein, or in concealing the same goods or chattels, to prevent the landlord from distraining the same for rent.

County of } *BE* it remembered, that on the _____ day of _____ in the _____ year of the reign of our sovereign lord George the third, by the grace of God king of Great Britain, &c. and in the year of our Lord _____, at _____ in the county of _____, A. I. of _____ in the said county of _____ gent. (if the complaint is exhibited by the bailiff, servant, or agent of the landlord, say, bailiff, servant, or agent, as the case may be, of A. L. of _____ in the county of _____ gent.) in his proper person cometh before us J. P. esquire and J. P. esquire, being two of the justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county of _____, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, residing near the place whence the goods, and chattels hereinafter mentioned were removed, (or, if the proceedings are before justices residing near the place where the goods and chattels were found, say, residing near the place where the goods and chattels hereinafter mentioned were found,) we or either of us not being interested in the _____ (here describe the place whence such goods and chattels were removed, as messuage, dwelling house, cottage, close, &c. as the case may be,) and (if the complaint is exhibited by the bailiff, servant, or agent of the landlord, say, in the behalf of the said A. L.) exhibiteth before us a certain complaint

in writing against A. O. of the parish of ——— in the county of ——— yeoman, and thereby giveth us the said justices to understand and be informed, that the said A. T. (or one A. T. naming the tenant) for the half of a year next before and ending at and upon the 25th day of December in the year of our Lord ———, held and enjoyed a certain ——— (here describe the demised premises), with the appurtenances, situate, lying, and being in the parish of ——— in the county of ———, as tenant thereof to the said A. L. under a demise thereof then-tofore made, at the yearly rent of ——— payable to the said A. L. half yearly, to wit, on the 24th day of June and the 25th day of December, by even and equal portions; and that on the said 25th day of December in the said year of our Lord ———, the sum of ——— of the rent aforesaid, for the half of a year, ending on the said 25th day of December in the said year of our Lord ———, on that day in that year became and was and still is due in arrear and unpaid from the said A. T. to the said A. L. and that the said sum of ——— of the rent aforesaid so being due in arrear and unpaid from the said A. T. to the said A. L. the said A. T. afterwards, that is to say, on the ——— day of ——— in the year of our Lord ———, fraudulently and clandestinely conveyed away and carried off and from the said demised premises (or you may say, off and from a certain close, part and parcel of the said demised premises) one, &c. (here describe the goods and chattels fraudulently removed and conveyed away) being the proper goods and chattels of the said A. T. and the same, not exceeding the value of 50 l. but being of less value, to wit, of the value of ——— of lawful money of Great Britain, to prevent the said A. L. from distraining the same for the said arrears of rent so then due and unpaid as aforesaid, (if the complaint is against a third person for assisting the tenant in such fraudulent carrying off his goods, say, and that the said A. O. on the same day and year aforesaid, did wilfully and knowingly aid and assist the said A. T. in such fraudulent conveying away and carrying off and from the said demised premises the said goods and chattels and every part thereof, or, if the complaint against such third person is for concealing the goods so fraudulently carried off the premises, say, and that the said A. O. afterwards, and after the said goods and chattels were so fraudulently and clandestinely conveyed away and carried off and from the said demised premises as aforesaid, to wit, on the same day and year aforesaid, at the parish of ——— in the county of ———, did wilfully and knowingly aid and assist the said A. T. in concealing the said goods and chattels and every part thereof,) contrary the form of the Statute

in such case made and provided, whereby and by force of the said statute, the said A. O. hath forfeited to the said A. L. from whose estate the said goods and chattels were so fraudulently carried off as aforesaid, double the value of the said goods so by him carried off (or concealed) as aforesaid; and thereupon the said A. L. humbly prays, that the said A. O. may be convicted of the said offence according to the form of the statute in such case made and provided; and that the said A. O. may be summoned to answer the said premises and to make his defence thereto before us the said justices. Whereupon, the said A. O. having been duly summoned in this behalf to answer and make his defence to the said complaint, and the said offence therein charged upon him, before us the said justices, afterwards, that is to say, on the — day of — in the said year of our Lord —, at — aforesaid in the said county of —, appeareth and is present before us the said justices, in order to answer and make good his defence to the said complaint, and the said offence therein charged upon him as aforesaid; and he the said A. O. having heard the same, is asked by us the said justices, if he can say any thing for himself why he the said A. O. should not be convicted of the premises above charged upon him in form aforesaid; who pleadeth, that he is not guilty of the said offence: Nevertheless, on the said — day of — in the said year of our Lord —, at — aforesaid in the said county of —, one credible witness, to wit, A. W. of — in the county of — yeoman, cometh before us the said justices in his proper person, and before us the said justices the said A. W. being then and there, to wit, on the same day and year last aforesaid, at — aforesaid in the said county of —, duly sworn touching the premises, upon the holy gospel of God, on his corporal oath to him then and there administered by us the said justices (we the said justices having then and there full power and authority to administer the said oath to the said A. W.), deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, in the presence and hearing of the said A. O. that (here set forth the evidence, which must prove, the particulars of the demise; the amount of the rent in arrear; the fact of removing the goods, and the circumstances of privacy or fraud attending it; and if the complaint is against a third person for assisting, the fact of such assistance and its particular manner; or, if the complaint against such third person is for concealing the goods or chattels so fraudulently conveyed away by the tenant, the fact of concealing such goods and chattels, and which of them in particular, and the place where they were found so concealed: and lastly, the value of the goods so removed

Distress.

moved and carried away or concealed,) *Whereupon, all and singular the matters and things in the said complaint and evidence contained, being by the said A. O. then heard and fully understood, the said A. O. is by us the said justices asked what he hath to say or offer in his defence against the said complaint and offence, and in answer to the evidence given as above mentioned, and what he hath to say why he should not be convicted of the premises so charged upon him: And forasmuch as upon hearing and fully understanding the said complaint and the evidence given as above mentioned, and also upon hearing and fully understanding all and singular the matters and things by the said A. O. alleged and proved in his defence touching the premises in the said complaint specified, it manifestly appears to us the said justices that the said A. O. is guilty of the premises above charged upon him in the said complaint; and that the said goods and chattels in the said complaint mentioned, at the time of the carrying off (or concealing) the same, as in the said complaint is mentioned, were of the value of ——— of lawful money of Great Britain: Therefore it is adjudged by us the said justices, that the said A. O. be convicted, and he is hereby convicted by us the said justices of the offence charged upon him in and by the said complaint, according to the form of the statute in such case made and provided; and we do adjudge and order the said A. O. to pay to the said A. I. (if the complaint is by the bailiff, servant, or agent of the landlord, say, to the use of the said A. L.) the sum of ——— (being double the value of the said goods and chattels in the said complaint mentioned), on the ——— day of ——— now next ensuing, according to the form of the statute in such case made and provided. In witness whereof we the said justices to this record of conviction have put our hands and seals at ——— aforesaid in the said county of ———, the ——— day of ——— in the ——— year of the reign of our said sovereign lord the now king, and in the year of our Lord ———.*

- D. Warrant of distress, in case the offenders having notice, refuse or neglect to pay, pursuant to the preceding order. 11 G. 2. c. 19. 27 G. 2. c. 20.

Westmorland. { To the constable of ———

WHEREAS A. T. of ——— yeoman, A. O. of ——— yeoman; and B. O. of ——— yeoman, were by an order dated the ——— day of ——— under the hands and seals of us ——— and ——— justices of the peace of ——— residing near

near ——— not being interested in ——— ordered to pay the sum of ——— to ——— or his bailiff, servant, or agent, on or before the ——— day of ——— being double the value of certain goods and chattels of the said ——— which the said A. T. was before us duly convicted of having fraudulently and clandestinely removed and conveyed away from ——— to prevent the said ——— from distraining the said goods and chattels for arrears of rent due to the said ——— for the said ——— and which the said A. O. and B. O. were also duly convicted before us, of having wilfully and knowingly aided and assisted the said A. T. in so fraudulently and clandestinely removing and conveying away, and in concealing the same: And whereas the said A. T. A. O. and B. O. having notice of our said order, have refused or neglected to pay, and have not paid, the said sum of ——— pursuant therunto, and the same hath been fully proved before us: These are therefore to command you to levy the said sum of ——— by distress and sale of the goods and chattels of the said A. T. A. O. and B. O. and we do hereby order and direct the goods and chattels so to be distrained, to be sold and disposed of, within ——— days, unless the said sum of ——— for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid: And you are also hereby commanded to certify to us what you shall do by virtue of this our warrant. Given under our hands and seals at ——— the ——— day of ———.

E. The constable's return thereupon of the want of distress.

Westmorland. I A. C. constable of ——— do hereby certify ——— and ——— justices of the peace of ——— that I have made diligent search for, but do not know of, nor can find, any goods and chattels of ——— and ——— and ——— or of any of them, by distress and sale whereof I may levy the sum of ——— pursuant to their warrant for that purpose, dated the ——— day of ———. Given under my hand this ——— day of ———.

F. Commitment thereupon to the house of correction.

Westmorland. { To the constable of ——— and also to the keeper of the house of correction at ———.

WHEREAS ——— and ——— and ——— were by an order dated the ——— day of ——— under the hands and seals of us ——— justices of the peace of ———

residing near ——— not being interested in ——— ordered to pay the sum of ——— to ——— or to his bailiff, servant, or agent, on or before the ——— day of ——— being double the value of certain goods and chattels of the said ——— which the said ——— was before us duly convicted of having fraudulently and clandestinely removed and conveyed away from ——— to prevent the said ——— from distraining the said goods and chattels, for arrears of rent due to the said ——— for the said ——— : And which the said ——— and ——— were also duly convicted before us of having wilfully and knowingly aided and assisted the said ——— in so fraudulently and clandestinely removing and conveying away, and in concealing the same : And whereas the said ——— and ——— and ——— having notice of our said order, have refused or neglected to pay, and have not paid, the said sum of ——— pursuant therunto, and the same hath been duly proved before us : And whereas it appears to us, by the return of ——— constable of ——— dated the ——— day of ——— that he hath made diligent search for, but doth not know of, nor can find, any goods and chattels of the said ——— and ——— and ——— or any of them, by distress and sale whereof the said sum of ——— may be levied, pursuant to our warrant duly made and issued for the levying the said sum of ——— by distress and sale of the goods and chattels of the said ——— and ——— and ——— : These are therefore to command you the said constable of ——— to apprehend the said ——— and ——— and ——— and convey them to the said house of correction at ——— aforesaid, and deliver them there to the said keeper of the said house of correction : And these are also to command you the said keeper of the said house of correction, to receive them the said ——— and ——— and ——— into the said house of correction, and there keep them to hard labour, without bail or mainprize, for the space of six months, unless the said sum of ——— so ordered to be paid as aforesaid, shall be sooner satisfied. Given under our bands and seals at ——— the ——— day of ——— .

G. Form of a complaint and oath to be made before a justice, in case of a dwelling house, where goods and chattels are fraudulently and clandestinely removed and conveyed away and secured, so as to prevent them from being taken and seized as a distress for arrears of rent.

Westmorland. **B**E it remembered, that this ——— day of ——— A. I. of ——— yeoman, complaining, and maketh oath, that certain goods and chattels of
A. O.

A. O. of — yeoman, have been fraudulently and clandestinely conveyed and carried away from — by the said A. O. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein, to prevent — from distraining the said goods and chattels for arrears of rent due to the said — for the said —: And that the said goods and chattels are put, placed, or kept, in the house, barn, stable, outhouse, yard, close, or other place of — at — locked up, fastened, or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent; And that the said A. I. hath a reasonable ground to suspect, and doth suspect, that the said goods and chattels are in the dwelling house of the said — at —.

A. I.

Taken and sworn at — the —
day of — before —

H. Warrant upon the preceding complaint and oath.

Westmorland. { To the constable, headborough, borsholder, or other peace officer of — and to each and every of them.

WHEREAS A. I. of — yeoman, hath this — day of — exhibited his complaint and made oath before — justices of the peace of — that certain goods and chattels of A. O. of — yeoman, have been fraudulently and clandestinely conveyed and carried away from — by the said A. O. his servant or servants, agent or agents, or other person or persons aiding or assisting therein, to prevent — from distraining the said goods and chattels for arrears of rent due to the said — for the said —: And that the said goods and chattels are put, placed, or kept in the house, barn, stable, outhouse, yard, close, or other place of — at — locked up, fastened, or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent; and that the said A. I. hath a reasonable ground to suspect, and doth suspect, that the said goods and chattels are in the dwelling house of — at —: These are therefore to command you, and each and every of you, to aid and assist — his steward, bailiff, receiver, or other person or persons empowered to take and seize as a distress for rent the said goods and chattels, in the day time to break open, and enter into the said dwelling house, barn, stable, outhouse, yard, close,

Distress.

or other place of the said — at — and to take and seize the said goods and chattels for the said arrears of rent, according to law. Given under my hand and seal at — the — day of —.

I. If the landlord does not distrain himself, he may authorize any other person, in the following manner, or to the like effect:

I Do hereby authorize A. B. of — in the county of — yeoman, to distrain the goods and chattels of A. T. of — in the said county, husbandman, in the houses, out-houses, and premises [or as the case may be] which he farms of me, situate at — for — arrear of rent due to me for the said premises, at — last past: And for your so doing this shall be a sufficient warrant. Witness my hand the — day of —.

Then either the landlord himself, or the person empowered by him as aforesaid, must go upon the premises and seize the distress, or some part in the name of the whole, and make an inventory thereof as follows:

An inventory of the several goods and chattels, distrained by us whose names are under written, the — day of — in the year — in the houses, out-houses, and lands, of A. T. in — by the authority and on the behalf of A. L. of — for — pounds arrear of rent due to him the said A. L.

In the dwelling house:

One table,
Six chairs, &c.

In the cow house:

Six cows,
Two calves, &c.

K. Notice.

A. T.

TAKE notice, that by the authority and on the behalf of your landlord A. L. I have this — day of — in the year of our Lord — distrained the several goods and chattels specified in the schedule hereunto annexed, in your houses, out-houses, and grounds, at — for — pounds arrear of rent due to him the said A. L.: And if you shall not pay the said rent so due and in arrear as aforesaid, or replevy the said goods and chattels, I shall, after the expiration of five days from the date

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date hereof, cause the said goods and chattels to be appraised and sold, according to the statute in that case made and provided. Given under my hand the day and year first above written.

A. D.

*Witness that a copy hereof was
this day delivered to the said
A. T. (Or left at the chief
mansion house of the said A. T.)*

A. W. (a)

A copy of which inventory and notice must be left with the tenant.

If the rent is not paid, nor the goods replevied before the time mentioned in the notice, the person distraining must go to the place where the distress is secured, with a constable and two sufficient appraisers, who are to take the following oath, to be administered by the constable :

L. Appraisers oath.

YOU and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your understanding ; So help you God.

M. Form of the appraisement.

THE appraisement may be in the form of the inventory, specifying the particulars, and their respective valuations : And then add at the end,

Appraised by us, this — day of — in the year —
A. P. }
B. P. } sworn Appraisers.

After which the goods must be sold for the best price that can be had, and after deducting the rent, and reasonable charges attending the distress, the overplus (if any) is to be returned to the tenant.

But if the tenant request the landlord to give further time for selling the goods distrained, and the landlord consent ; it is best for the tenant to sign a memorandum thereof to the following effect :

I A. T. do hereby request that A. L. my landlord, who on the — day of — last, distrained my goods and chattels in my houses, outhouses, and grounds at — in the

(a) If the landlord distrain himself, the forms may be easily altered accordingly.

Distress.

county of ———, will forbear the sale thereof, until the ——— day of ——— next, in order to enable me to discharge my said rent; and I do consent that the said goods and chattels so distrained, may remain at my proper cost, and in his possession, upon the premises where they now are until that time. In witness whereof, I have hereunto set my hand the ——— day of ———.

A. T.

Witness, A. W.

N. Notice to be affixed on the premises being deserted.

Abraham Sutcliffe,

TAKE notice, that upon the complaint of E. A. of ——— in the county of ——— made unto us A. P. and B. P. esquires, two of his majesty's justices of the peace for the said county, that you the said A. S. have deserted the messuage and tenement called ——— consisting of ——— situate, lying, and being at ——— aforesaid in the county aforesaid, unto you demised at rack rent by the said E. A. and that there is in arrear and due from you the said A. S. unto the said E. A. one whole year's rent for the said demised premises, and that you have left the said premises uncultivated and unoccupied, so that no sufficient distress can be had, to countervail the said arrears of rent; we the said justices, (having no interest, nor either of us having any interest in the said demised premises,) on the said complaint as aforesaid, and at the request of the said E. A. have this day come upon and viewed the said demised premises, and do find the said complaint to be true; and on the ——— day of this present month of ——— we will return to take a second view thereof, and if upon such second view, you, or some person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, then we the said justices will put the said E. A. into the possession of the said demised premises, according to the form of the statute in such case made and provided. In witness whereof we have hereunto set our hands and seals, and have caused this notice to be affixed on the one door of the mansion house, the same being the most notorious part of the said premises, this ——— day of ——— in the ——— year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland king.

Record

Record of putting the landlord in possession.

Westmorland. **BE** it remembered, that on the — day of — in the — year of the reign of our sovereign lord George the third of Great Britain, France, and Ireland king, defender of the faith, and soforth, at — in the said county. A. L. of — in the said county, — complained unto us, J. P. and K. P. esquires, two of the justices of our said lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, that he the said A. L. did demise at rack rent unto A. T. of — husbandman, a messuage and tenement called — consisting of — situate, lying, and being at — aforesaid in the county aforesaid, and that on the said — day of — in the year aforesaid, there was in arrear and due unto the said A. L. from him the said A. T. the tenant of the said demised premises, one whole year's rent thereof, and that he the said A. T. hath deserted the said demised premises, and left the same uncultivated and unoccupied, so as no sufficient distress could be had to countervail the said arrears of rent; Whereupon the said A. L. then and there, to wit, on the said — day of —, in the year aforesaid, at — aforesaid in the county aforesaid, requested of us the said justices, that a due remedy should be provided, according to the form of the statute in that case made and provided; which complaint and request by us the aforesaid justices being heard; We, (having no interest, nor either of us having any interest in the said demised premises,) on the said — day of — in the year aforesaid, at — aforesaid in the county aforesaid, did personally go upon and view the said demised premises, and then and there upon our own proper view did find the said complaint to be true, and did then and there affix on the most notorious part of the said demised premises, to wit, upon the outer door of the mansion house, a notice in writing under our hands and seals, that we the said justices, on the — day of — next, would return to take a second view thereof; upon which said — day of — in the year aforesaid, we did return and take a second view of the said premises, and there upon our own proper view did find, that he the said A. T. did not appear, nor any person on his behalf, to pay the said rent in arrear, and that there was no sufficient distress upon the said premises, nor upon any part thereof, to countervail the said arrear of rent: Therefore we the said justices at — aforesaid in the county aforesaid, on the — day of —

Distress.

of — aforesaid, did put the said A. L. into possession of the said demised premises, according to the form of the statute aforesaid. In witness whereof we the said justices unto this record do set our hands and seals, the — day of — in the year of our Lord —.

Distringas. See Process.

Divine Service. See Publick Worship.

Dogs.

So far as Dogs fall under the consideration of the Game laws, See title Game.

Dogs mischievous.

A *Mastiff*, going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his majesty's subjects, seemeth to be a common nuisance, and consequently the owner may be indicted (A) for suffering him to go at large.

And in the case of *Smith v. Pelab*, H. 20 G. 2. It was ruled, that if a dog has once bit a man, and the owner having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of the person bit, though it happened by his treading on the dog's toes; for it was occasioned by his not killing the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered. *Sir. 1264.*

But in order to maintain an action for *biting* by the defendant's dog, it must be proved also that *he knew* his dog to be used to bite; but one instance is sufficient in that case. *12 Mod. 555.*

If a man has a dog that *kills sheep*, this is not a publick nuisance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be punished for this killing: And in an action upon the case for such killing, the plaintiff shall be required to prove in evidence, that the dog had used to kill sheep. *Dyer 25. Hist. 171.*

And if a man keeps a dog accustomed to bite *sheep*, and he knows it, and notwithstanding he keeps the dog still, and afterwards the dog bites an *horse*; this shall be actionable,

able, altho' he had been known before to bite sheep only: because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt. *Ld. Raym.* 110.

M. 17 G. 3. On an action of trover and conversion Dog straying. for a pointing dog, the plaintiff proved the dog to be his property, and that it was found at the defendant's house twelve months after it was lost. The defendant said, the dog strayed there casually, and demanded 20s. for 20 weeks keeping, before he would deliver up the dog. A verdict was given for the plaintiff, subject to the opinion of the court, whether this refusal amounted to a conversion of the dog. But the counsel for the defendant declined arguing the question, and the plaintiff had judgment. *Black. Rep.* 1117.

Stealing dogs is not felony; for however they may Stealing dogs. be valued by the owner, yet they shall never be so highly regarded by the law, that for the sake of them a man shall die. *1 Haw.* 93.

But by the 10 G. 3. c. 18. If any person shall steal any dog or dogs, of any kind or sort whatsoever, from the owner thereof, or from any person intrusted by the owner therewith; or shall sell, buy or receive, harbour, detain or keep any such dog or dogs, knowing the same to have been stolen; every such person shall, on conviction upon the oath of one witness, or his or her own confession, before two justices, forfeit for the first offence any sum not exceeding 30 l. nor less than 20 l. as to such justices shall seem meet, together with the charges previous to and attending such conviction, to be ascertained by such justice before whom the offender shall be convicted; and if not forthwith paid, the said justices shall commit the offender to the common gaol or house of correction, for any time not exceeding 12 calendar months, nor less than six, or until the penalty and charges shall be paid; and if any person, having been convicted as aforesaid, shall afterwards be guilty of the like offence, and shall be thereof convicted in like manner as aforesaid, every such person shall forfeit not exceeding 50 l. nor less than 30 l. as to such justices shall seem meet, together with the charges previous to and attending such conviction, to be ascertained by such justices before whom the offender shall be convicted; which said penalties, or any of them, when recovered, shall be paid half to the informer, and half to the poor; and upon non-payment thereof, such justices shall commit the offender to the common gaol or house of correction,

rection, for any time not exceeding 18 months, nor less than 12, or until the penalty and charges shall be paid; and such justices shall also order the offender to be publicly whipped, within three days after such commitment, in the town wherein such gaol or house of correction, shall be, between the hours of twelve and one of the clock.
s. 1.

And one justice, on information to him made, may grant a warrant to search for any dog stolen as aforesaid; and in case any such dog or the skin thereof shall upon such search be found, the said justice shall take and restore such dog or skin to the owner thereof; and the person in whose custody or possession such dog or skin shall be so found (in case it shall appear that such person was privy to such dog having been stolen, or that such skin was the skin of any such dog stolen as aforesaid) shall respectively be subject and liable to the like penalties and punishments, as persons convicted of stealing any dog or dogs are herein before made subject and liable to. s. 2.

And for the more easy conviction of offenders, the justices may cause the conviction to be drawn up in the following form, or to the same effect, as the case may happen:

Form of conviction.

Be it remembered, That on the ——— day of ——— in the year of our Lord ——— A. B. is convicted before us ——— of his majesty's justices of the peace for the ——— of ——— (specifying the offence, and the time and place when and where the same was committed, as the case shall be). Given under our hands and seals the day and year aforesaid.
s. 3.

Appeal.

Provided, that if any person shall think himself or herself aggrieved by any thing done in pursuance of this act, such person may appeal to the next general quarter sessions, within four days after the cause of complaint shall arise; such appellant giving 14 days notice at least in writing of his intention to appeal, and of the matter thereof, to the person whose acts are complained against; and within two days after such notice entering into a recognizance, before a justice, with two sureties, conditioned to try such appeal, and abide the order of, and to pay such costs as shall be awarded by the justices at such quarter session: And the said justices at such session, on proof of such notice and recognizance, shall hear and determine the appeal in a summary way, and award such costs to the parties appealing or appealed against, as they shall think proper:
And

And their determination shall be final ; and no order or other proceedings touching the conviction of any offender against this act shall be quashed for want of form, or be removed by *certiorari* or other writ into any of his majesty's courts of record at *Westminster*. l. 4.

[Here seem to be some difficulties upon this act : as,

(1) With regard to the *offence* : *If any person shall steal any dog or dogs*. It is not a mere cavil, in a case where a man's property or liberty is so considerably affected, to surmise, that it may be doubtful whether upon this act it is penal to steal a *bitch*. In the case of *horse stealing*, the act runs, *any horse, mare, or gelding* : And it is not usual, where a man has stolen a *mare*, to indict him for stealing a *horse*. And so tender is the law in these matters, that when by the 1 Ed. 6. c. 12. it was enacted, that no person or persons convicted of stealing horses, mares, or geldings, should be admitted to the benefit of clergy ; this was not thought sufficient to exclude from the said benefit any person who should steal only one horse, mare, or gelding ; but an explanatory act (2 & 3 Ed. 6. c. 33.) was thought necessary for that purpose. And the reason is plain : What a man has a right to (as his life, liberty, or estate) by a clear and undoubted law, shall not be taken from him by a law less clear and certain. And in this very act before us, a distinction of sexes is made throughout with respect to the offenders, (*him or her; himself or herself,*) which distinction being not observed with respect to the *offence*, it may possibly be argued, that in a case so penal, the statute shall not be extended further than the words will strictly bear.

(2) With respect to the *penalties* : As the clause stands, there may be a doubt concerning the application of the forfeitures for the first offence ; for tho' it is said, that the said forfeitures or *any of them* shall be paid half to the informer and half to the poor, yet in the very next words following, it is said, that on nonpayment thereof the justices shall commit the offender for any time not exceeding 18 months nor less than 12, which words are only applicable to the penalty for a second or other subsequent offence :—In like manner, it seems doubtful, whether the *whipping* shall be understood for the first, or only for a subsequent offence. Also the *special time* of whipping is not clearly ascertained, being only *between the hours of twelve and one of the clock*, which may be either in the morning soon after midnight, or in the afternoon.——

There is also a small mistake, where it is said, that the

charges of conviction shall be ascertained by the *justice* before whom the offender shall be convicted; whereas the conviction must be by *two justices*.

(3) The clause concerning the *appeal* seemeth inconsistent, or otherwise unintelligible. The appeal must be to the *next general quarter sessions, within four days after the cause of complaint shall arise, and of this fourteen days notice shall be given to the persons whose acts are complained against.*—Whatever these words may signify, the imprisonment is still going on; for if the forfeiture is not *forthwith* paid, the offender shall be committed: And at all events, the *whipping* will be over before the appeal can commence.]

Duty on dogs.

By the 36 G. 3. c. 124. after 5th July 1796, every person who shall keep any greyhound, hound, pointer, setting-dog, spaniel, lurcher, or tarrier; or who shall keep two or more dogs of whatever description or denomination the same may be, shall be assessed annually 5s. for every such dog. And every person who shall inhabit any dwelling house assessed to any of the duties on inhabited houses, or on windows or lights, and shall keep one dog and no more, such dog not being a greyhound, hound, pointer, setting-dog, spaniel, lurcher, or tarrier, shall be assessed annually 3s. for such dog. *f. 1.*

Dogs at six months old liable to the duty.

Provided, that no dog or whelp shall be charged with the said duty, which at the time of returning the lists of dogs hereinafter required, shall not be six calendar months old; and if any dispute shall arise touching the age of such dog or whelp, the commissioners on appeal shall finally hear and determine the same; and upon every appeal for any matter or thing under this act, if the dispute shall be respecting the age of such dog or whelp, the fact of the age thereof shall lie on the owner claiming such exemption, on his oath or affirmation, or on the oath of one witness. *f. 2.*

Duties to be assessed and collected as the duty on horses.

And the duties hereby imposed shall be assessed, and collected by such persons, and in like form and manner, and with such allowances, and under such penalties, forfeitures, and disabilities, and according to such rules, method, and directions as are prescribed for raising the duties on horses; and all powers, authorities, rules, directions, penalties, forfeitures, jurisdictions, clauses, matters, and things contained in any act of parliament relative to the duties on horses, shall be in full force in raising the duties hereby imposed. *f. 3.*

And

And the first assessment shall be made for three quarters of a year from the 5th day of *July* 1796, and the first list shall contain the greatest number of dogs kept in the year preceding, and ending on 5th *July* 1796. And afterwards the said assessments shall be made for one year from 5th *April* yearly, and such list shall contain the greatest number of dogs kept in the year preceding, and ending on 5th *April* yearly. *s. 4.*

Making assessments and lists.

And the commissioners for the duties on horses shall be commissioners for executing this act; who shall hold their first meeting before 30th *July* 1796, and afterwards at the same times and places as for the putting in execution the duties on horses; and shall proceed in the same manner as is preferred for levying the said duties on horses. *s. 5.*

Commissioners for the horse duties to put this act in execution.

And the surveyors, inspectors, assessors, and collectors respectively appointed for raising the duties on horses shall put this act in execution, and shall cause notices for preparing lists and declarations to be delivered to every person liable to the duties hereby imposed, at such times, and in such manner, and under the like penalties, and subject to such surcharges as for the duties on horses, whether any such person keeping any such dog shall be liable to the duties on horses or not. *Id.*

Surveyors, inspectors, assessors, and collectors.

And such assessors may deliver joint or distinct notices to persons liable to any of the duties on horses, servants, or carriages, or for wearing hair powder according to circumstances, or as the commissioners shall direct. *s. 6.*

Notices may be joint or separate.

And if any assessor, who shall be required by the commissioners to prepare, sign, or deliver any such notice, shall neglect or refuse so to do, on complaint to the commissioners at any meeting within the precinct, he shall forfeit not exceeding 5*l.* nor less than 4*s.* to be levied as any other penalty inflicted by such commissioners for neglect of duty by any law now in force. *Id.*

Penalty for neglect of duty.

Provided, that if any person shall be desirous to compound for any number of hounds, and shall give notice thereof to the collector where he shall be liable to be assessed, of his intention so to do, and shall pay 1*5l.* within thirty days after 5th *July* 1796, and in any subsequent year 20*l.* within thirty days after 5th *April* in such year, he shall not be liable to be assessed for any hound by him kept. And if such person shall be liable to be assessed in two or more parishes or places, he shall give like notice to the proper officers in every such parish or place, and shall declare in which such composition is intended to be made; and every such collector to whom such composition shall be paid, shall give a receipt for the same. *s. 7.*

Persons may compound for hounds.

(A) Westmorland. *THE jurors for our lord the king upon their oath present, that A. O. late of the parish of — in the said county, — on the — day of —, in the — year of the reign of our sovereign lord George the Third, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and on divers other days and times, between that day and the day of the taking of this inquisition, at the parish aforesaid in the county aforesaid, near unto the king's common highway, there unlawfully did keep, and still doth keep, a certain large dog, of a fierce and furious nature; and the said dog, on the said — day of — in the year aforesaid, and on the said other days and times, at the parish aforesaid in the county aforesaid, near unto the said highway, there unlawfully did permit and suffer, and still doth permit and suffer to go unmuzzled, and at large, by reason whereof the liege subjects of our said lord the king, on the said — day of — in the year aforesaid, and on the said other days and times, at the parish aforesaid in the county aforesaid, could not, nor can they now go, return, pass, and labour in and through the said highway there, without great danger and hazard of being bit, maimed, and torn by the said dog, and losing their lives; to the great damage, terror, and common nuisance of all the liege subjects of our said lord the king, in, by, and through the said highway there going, returning, passing, re-passing, and labouring, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.*

Door breaking open. See Arrest.

Dower. See Forfeiture.

Drunkenness. See Alehouses.

Duelling. See Homicide.

Egyptians. See Vagrants.

Embracery. See Maintenance.

Escape.

THIS is to be understood of escapes in criminal cases; and not in civil cases, as for debt, or the like.

As

An escape is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *Terms de la ley.* Escape, what.

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an *escape*. 2. Caused by a stranger; this is commonly called a *rescue*. 3. By the party himself; either without force, which is simply an escape, or with force which is *prison breaking*. *Rescues and prison breaking* are treated of under their respective titles; and this title treats only of escapes properly so called. Concerning which we will treat in the following order: Several kinds thereof.

- I. *Of escape by the party himself.*
- II. *Escape suffered by a private person.*
- III. *Escape suffered by an officer.*
- IV. *What is a voluntary, and what a negligent escape.*
- V. *Concerning the retaking of a person escaped.*
- VI. *Indictment for an escape.*
- VII. *Trial and conviction for an escape.*
- VIII. *Punishment of an escape.*
- IX. *Aiding in attempting to escape.*

I. *Of escape by the party himself.*

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of an high contempt, punishable with fine and imprisonment. 2 *Haw.* Escape by party himself.

But escape committed by the party himself, belongs more properly to the title *Prison Breaking*.

II. *Escape suffered by a private person.*

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some Escape by a private person.

other who by law ought to have the custody of him. 2 *Haw.* 138.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. *Id.*

III. *Escape suffered by an officer.*

Escape by an officer.

There must be a previous arrest.

And justifiable.

And for a criminal offence.

And not detained only for fees.

Too much liberty, an escape.

In order to make an escape, there must be an actual arrest; and therefore if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw.* 129.

And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. *Id.*

And as the imprisonment must be justifiable, so it must be also for a criminal offence. *Id.*

Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, tho' the judgment were that *he be discharged paying his fees*, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal but only as a debtor, his escape cannot be more criminal than that of any other debtor: Yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also *till he pay his fees*; and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems, that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only; in the nonpayment of a debt in his power to release. 2 *Haw.* 129, 130.

Also, it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. 2 *May.* 130.

So if a gaoler, or other officer, shall licence his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, tho' the prisoner return again, according as he shall be prescribed. *Dalt. c. 159.*

If the gaoler so closely pursues the prisoner who flies from him, that he retakes him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, tho' he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had by the forfeiture on his attainder, but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. *2 Haw. 130.*

Losing sight, an escape.

IV. What is a voluntary, and what a negligent escape.

Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. *2 Haw. 130.*

Voluntary escape, what.

A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. *Dalt. c. 159.*

Negligent escape, what.

If the constable or other officer shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief: Otherwise if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Id.*

Suffering a prisoner to kill himself.

V. Concerning the retaking of a person escaped.

If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot, after arrest, take him again by force of his former warrant, for that this was by the consent of the officer: But if he return, and put himself again under the custody of the officer, it

Let go voluntarily cannot be retaken.

Fresh suit.

seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c. 169. 1 Haw. 81.*

But if the party arrested had escaped of his own wrong, without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or country, and bring him before the justice, upon whole warrant he was first arrested. *Dalt. c. 169.*

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. *2 Haw. 131, 132.*

Breaking open door to retake.

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house, the doors may be broke open to take him, on refusal of admittance. *2 Haw. 87.*

Retaking excuseth not the escape.

It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after: And it is clear, that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him; but must in such case be content to submit to such punishment, as his negligence shall appear to deserve. *2 Haw. 132.*

VI. Indictment for an escape.

Indictment.

It seems clear, that every indictment (A) for an escape, whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime; and that he went at large: And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony: But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that is not material in this case, whether the person who escaped were guilty or not. *2 Haw. 133. 229.*

VII. Trial and conviction for an escape.

If the prisoner be of record in a court, and the gaoler being called, cannot give an account where he is, this is a conviction of an escape; but seems not a conviction of a voluntary escape, unless the gaoler confesseth it: And the gaoler may be fined in such a case; but not convicted of felony, without indictment or presentment. 1 *H. H.* 599. 603.

Gaoler not producing him, a conviction.

And it seems to be clear, that a keeper, who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprision, before the attainder of the principal offender. 2 *Haw.* 135. 2 *Inst.* 591, 592.

Felony to be tried before the escape.

VIII. Punishment of an escape.

If a felon escapes before arrest, it is not punishable in him as felony; but for the flight he forfeits his goods when presented. *Hal's Pl.* 111.

Punishment of escape before arrest.

If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him; but if a constable or other officer hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *H. H.* 601.

Of escape by a private person.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw.* 136. 139. 1 *H. H.* 600. 604.

Of a negligent escape.

And it seems to be the better opinion, that the sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

Note; Mr. *Hawkins*, although he is one of the most accurate of all writers, yet hath inserted in this place cer-

tain penalties for escapes, which were expired above 200 years before. 2 *Haw.* 137.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their escape; for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners; or to retake them that escape. 1 *H. H.* 601.

Of a voluntary
escape.

It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Haw.* 134.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c.* 159.

Also a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he was never so rightfully entitled to such custody; for that the crime is in both cases of the same ill consequence to the publick: and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 *Haw.* 134.

But it seemeth to be clear, that no one is punishable for felony, for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, altho' in all civil causes, the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape; this, inasmuch as it reacheth to life, is felony only in the gaoler, that was immediately trusted with the custody, and not in the sheriff. 1 *H. H.* 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the gaoler, for he was not privy to it, and therefore

therefore could not do it feloniously ; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler. 1 H. H. 547, 598.

But altho' the felony for which a man is committed be not within clergy ; yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 H. H. 599.

IX. Aiding in attempting to escape.

By the 16 G. 2. c. 31. If any person shall assist any prisoner to attempt his escape from any gaol, though no escape be actually made, if such prisoner was then attainted or convicted of treason or felony (except petty larceny), of lawfully committed to, or detained in any gaol, for treason or felony (except petty larceny) expressed in the warrant of commitment ; he shall be guilty of felony, and be transported for seven years ; and if such prisoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or was then in gaol for debt amounting to 100 l. he shall be guilty of a misdemeanor, and be liable to fine and imprisonment.

Aiding in attempting to escape.

And if any person shall convey, or cause to be conveyed, any disguise, instrument, or arms, to any prisoner in gaol, or to any other person there for his use, without consent of the keeper ; such person, although no escape or attempt be actually made, shall be deemed to have delivered such disguise, instrument, or arms, with an intent to assist such prisoner to escape or attempt to escape ; and if such prisoner then was attainted or convicted of treason or felony (except petty larceny), or lawfully detained in gaol for treason or felony (except petty larceny) expressed in the warrant of commitment ;—he shall be guilty of felony, and be transported for seven years : but if the prisoner was then convicted or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or for debt amounting to 100 l. he shall be guilty of a misdemeanor, and liable to fine and imprisonment.

And if any person shall assist any prisoner to attempt to escape from any constable, or other person who shall have the lawful charge of him, in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony (except

(except petty larceny); or if any person shall assist any felon to attempt his escape from on board any *boat or vessel carrying felons for transportation*, or from the *contractor* for the transportation of such felons, or his agents, he shall be guilty of felony, and be transported for seven years.

All prosecutions on this act to be commenced within a year after the offence committed.

A. Indictment against a constable for an escape.

Westmorland. **T**HE jurors for our lord the king upon their oath present, That on the ——— day of ——— in the ——— year of the reign of ——— at ——— in the county aforesaid, one A. I. of ——— came before J. P. esquire, then and yet one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to bear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and the said A. I. did, then and there, on his oath, before the same justice, charge, accuse, and give information against one A. O. of ——— aforesaid in the county aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of ——— at ——— in the said county [or, as the offence shall be]: Whereupon he the said J. P. the justice aforesaid, did then and there, to wit, at ——— aforesaid in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of ——— aforesaid in the county aforesaid, thereby requiring him the said constable to take the body of the said A. O. and bring him before the said J. P. the justice aforesaid, to answer to such matters and things as should be alleged against him, touching the said misdemeanor: Which said warrant, afterwards, to wit, on the same day and year above-mentioned, at ——— aforesaid in the county aforesaid, was delivered to one A. C. then being constable of ——— aforesaid, in due form of law, to be executed; by virtue of which said warrant the said A. C. afterwards, to wit, on the said ——— day of ——— in the year aforesaid, at ——— aforesaid in the said county, did take and arrest the body of the said A. O. and him the said A. O. in his custody for the cause aforesaid, had: Nevertheless, the said A. C. of ——— aforesaid in the county aforesaid, yeoman, afterwards, to wit, on the said ——— day of ——— in the year aforesaid, the duty of his office in that part not regarding at ——— aforesaid in the county aforesaid, unlawfully and negligently did permit the said A. O. to escape, and go at large, out of the custody of him the said A. C.

A. C. to the great hindrance of justice, in contempt of our said lord the king, and of his laws, and against the peace of our said lord the king, his crown and dignity.

Escheat. See Forfeiture.

Estray.

And herein also of goods *waived*.

ESTRAY is, *where any horses, sheep, hogs, beasts, or swans, do come into a lordship, and are not owned by any man.* Kitch. 23. *Estray, what.*

Where any horses, sheep, hogs, beasts, or swans] Bees, and other creatures of a wild nature, are not within this description, and therefore not to be reckoned amongst stray goods: nevertheless it seemeth that a swarm of bees, of which the owner hath lost sight, and consequently can make out no property, may be seized for the use of the king, or of the lord of the manor; for it is a maxim of the common law, that such goods whereof no one can claim property do belong to the king; and that which the king hath he may grant to another, and consequently another may prescribe to have the same, within such a precinct or lordship. And therefore it is said, that if any take honey or swarms of bees within the demesne of the lord, it is inquirable in the court baron. *Kitch. 114.*

Swans] Swans that be unmarked and wild (being at large and abroad) may be seized by the sheriff for the use of the king, by his prerogative. *Dalt. Sher. 80.*

Also swans marked and tame may be estrays. *Kitch. 86.* But it seemeth that no other fowl can be estray. *Wood, b. 2. c. 2.*

Do come into a lordship] That is, where the goods have no right to be: and therefore an estray cannot be in such place, where the party hath a right of common. *Dalt. Sher. 79.*

And are not owned by any man] Whereupon (as hath been said) the property accrueth to the king; and the cattle of the king cannot be estrays, nor forfeited as such to the lord of the manor. *Kitch. 81.*

Waif

Waif, what.

Waif is, where a felony in pursuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a pursuit was made, having them with him in his possession, fleeth, and waiveth, casteth away, or goeth from the goods: in these cases, they shall be said to be waived in law. But if he hath not the goods with him, when he fleeth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will, without any fresh suit. 5 Co. 109. *Dalt. Sher.* 78.

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon fresh suit was not attainted at the suit of the owner of the goods: And the reason why waif is given to the king, and that the party shall lose his property in such case, is for default in the owner that he pursued not freshly to apprehend the felon; for it concerneth the publick that crimes do not remain unpunished. And therefore the law hath imposed this penalty upon the owner, that if the thief by his industry and fresh suit be not attainted at his suit, in an appeal of the same felony, he shall lose for his default all his goods which the thief at the time of his flight waived. But if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they shall not be forfeited, for if he maketh fresh suit after notice of the felony it sufficeth. 5 Co. 109.

Seizure thereof
by the lord.

Hencefore waifs and strays were the finder's, by the law of nature; and afterward, the king's, by the law of nations. *Dalt. Sher.* 79.

Thus, one as a bailiff or servant to the sheriff seized a horse as an estray to the king's use, and proclaimed him, according to law, and after the year and day sold him, and the sheriff accounted him in the exchequer. *Id.* 80.

But now kings have granted this, and such like prerogatives, unto their subjects, within their liberties; so that waifs and strays are in many places, the lord's of the franchise where they are found. *Id.* 79.

And therefore waived goods and estrays shall be seized by the officer of the king, to the use of the king; or by the officer or bailiff of the lord, who hath such things by grant of the king, or by prescription, to the use of the lord. *Id.* 80.

But if one have a waif, and it be taken out of his manor, he shall have *trespass* without seizing, and though he do not seize it. *Kitch.* 81.

It

It seemeth to be agreed, that waifs and strays ought to be proclaimed in the two next market towns; and that if they are not proclaimed, the owner may take the stray goods again at any time: And it seemeth to be the general tenor of the old books, that they ought also to be proclaimed in the church: Which course it seemeth best to follow; to the end that the owner, who in this case is no wrong doer, may have a reasonable mean to come at his goods again; that is to say, that the goods be proclaimed at the least thrice, to wit, in the two market towns next adjoining to the place where they strayed, on the market days respectively, and at the church door on a Sunday, as the people come out of the church. *Kitch. 23. 81. 105. Dalt. Sher. 79. Cro. Eliz. 716.*

Proclaiming the goods seized.

And they ought to be wreathed; and to be put in some several ground in an open place, and not in any covert of wood, that the owner may have a view of them; for if they be in covert the property is not changed, tho' they be there a year and a day. *Kitch. 23.*

How waifs or strays are to be kept.

An estray is not to be used in any manner, except in case of necessity, as to milk a cow, or the like; but not to ride an horse, for within the year and day he hath not any property in him. *Cro. Jac. 147, 8.*

In the case of *Oxley v. Watts*, *M. 26 G. 3.* it was determined, that an action of trespass lies for working a horse taken as an estray. *Durnf. and East, 1 V. 12.*

He who taketh an *estray*, may keep it until he be satisfied for the finding, keeping, and proclaiming thereof. *Dalt. Sher. 79.*

Owner claiming.

But the owner (if it be within the year and day) may take it without telling any marks, or making any proof of property; but this may be done upon the trial, if contested. *2 Salk. 686.*

And the lord ought to make a demand of what the amends should be; and then if the party thinks the demand unreasonable, he may tender sufficient amends; and if the lord shall not accept it, this shall be settled by the jury upon trial.

But it is sufficient in this case to tender amends generally, without expressing any certain sum. For there is a difference between this case, and that of a tender of amends for trespass. In that of a trespass, if the defendant pleads a tender of amends, he must shew what he tendred; for he must tender a certain sum. And the law puts this difficulty upon him because he is the wrong doer: But the owner

Estray.

of the stray (as hath been said) is no wrong doer; and it is impossible he should know how long his beast hath been in the lord's custody, nor how much will make a proper satisfaction. 2 *Salk.* 686.

In the case of goods *waived*; the owner may seize them twenty years after, if the lord of the franchise, nor the king seized before; but if they are seized, then they become forfeited to the king or lord of the liberty. *Kitch.* 82.

And this forfeiture is not like a stray, where tho' the lord may seize, yet the party who is the owner may retake them within the year and day; but here the true owner cannot seize his own goods, tho' upon fresh suit within the year and day. 1 *H. H.* 541.

But this is not an absolute loss of the owner's goods, but rather an expedient settled by law, to drive the owner to convict the felon by prosecuting his appeal; and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convicted or attaint, and the fresh suit be enquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 1 *H. H.* 541.

Property accruing to the lord, on not claiming.

Waifs and strays, not claimed within the year and day, are the lord's. *Kitch.* 23. 80, 81.

For where the lord hath a year and a day a beast, and it be cried in the church and markets, the property is changed. *Kitch.* 80.

That is to say, after he hath had the beast a year and day from the time of the proclamation, and not from the time of the seizure: for after the first proclamation it becometh an estray, but not sooner. 11 *Med.* 89.

If the estray within the year estray out of the manor, the lord may chase back the estray unless it be seized by another lord who hath estrays; but if it be seized by such other lord, then the first hath lost all possibility of his gaining the property, and the other lord ought to proclaim it *de novo*. Finch 177. *Kitch.* 81. *Hutt.* 67.

Estate.

Estate, what.

ESTREAT (*extractum*) is used for the true copy or note of some original writing or record, and especially of fines and amerciaments, imposed in the rolls of a court, to be levied by the bailiff or other officer.

The

The justices and judges before whom fines or amerciaments shall be, shall charge the clerks of the estreats, by their oath to be made, that they make the rolls of such estreats distinctly, by expresse words, of the cause of the loss, of the term of the year, and the nature of the writ, and betwixt what parties such issues or amerciaments shall be lost, as well in the king's suit, as in the suit of the party.

Making out the estreats.

7 H. 4. c. 3.

All clerks of the peace, and town clerks, shall deliver to the sheriff, within 20 days after *Sept. 29*, yearly, a perfect estreat or schedule of all fines, issues, amerciaments, and other forfeitures whatsoever, forfeited in any sessions before *Michaelmas*; on pain of 50l. half to the king, and half to him that shall sue. 22 & 23 C. 2. c. 22. s. 7, 8.

Delivering the same to the sheriff.

And shall also yearly, on or before the second *Monday* after the morrow of *All Souls*, deliver into the court of exchequer, a duplicate, certificate, and estreat of such estreats and schedules, so delivered to the sheriff; on the like pain of 50l. *Id.* s. 8. And likewise they may be further amerced by the barons of the exchequer. 3 G. c. 15. s. 12.

And into the court of exchequer.

And upon delivery thereof, they shall take the following oath, to be administered by one of the barons:

YOU shall swear, that these estreats now by you delivered, are truly and carefully made up and examined; and that all fines, issues, amerciaments, recognizances, and forfeitures which were set, lost, imposed, or forfeited, and in right and due course of law ought to be estreated in the court of exchequer, are, to the best of your knowledge and understanding, therein contained; and that in the same estreats are also contained and expressed all such fines, as have been paid into the court, from which the said estreats are made, without any wilful or fraudulent discharge, omission, misnomer, or defect whatsoever: So help you God. 4 & 5 W. c. 24. s. 5.

And if he shall withhold, or miscertify the same, he shall forfeit treble; half to the king, and half to him that shall sue; and shall also lose his office, and be incapable to hold any office in the revenue. 22 & 23 C. 2. c. 22. s. 9.

Penalty of making default.

If recognizances be estreated into the exchequer, because not punctually complied with; yet if the party appears and takes his trial the next sessions, or otherwise performs what he was bound to by the recognizance as the

Party coming in after the estreat.

case

caſe ſhall be, he may compound for a very ſmall matter in the court of exchequer: becauſe the effect, tho' not the exact form of the recognizance, is complied with. 10 *Mod.* 278.

Proceſs for levying.

Where any fine or forfeiture ſhall be paid to the ſheriff, clerk of the peace, or other officer, and ſo certified into the exchequer: proceſs ſhall be awarded to the ſheriff againſt ſuch perſon for levying the ſame. 22 & 23 *C. 2. c. 22. ſ. 10.*

Sheriff's duty in levying.

And in levying, the ſheriff ſhall ſhew the eſtreats under the ſeal of the exchequer, to the party indebted; on pain of treble damages to the party, and fine to the king, on conviction before the juſtices of the peace, or other juſtices. 42 *Ed. 3. c. 9.*

Eſtreats in the torn.

And the ſheriff ſhall make no eſtreats to levy his own amerciaments (that is to ſay, in the torn), till two juſtices (1 *Q.*) to be named at *Michaelmas* ſeſſions by the *cuſtus rotulorum*, or in his abſence by the eldeſt in the commiſſion, have inſpected his books; and the ſaid eſtreats ſhall be indented betwixt the ſaid juſtices and ſheriff, ſealed with their ſeals, the one part to remain with the juſtices, and the other with the ſheriff: And the perſons who ſhall gather the ſaid amerciaments, ſhall be ſworn by the ſaid juſtices, that they ſhall take no more than is forfeited, and contained in the ſaid eſtreats. 11 *H. 7. c. 15.*

Form of the eſtreat.

Westmorland. **A**N extract of all the iſſues, fines, amerciaments, and recognizances, ſet, laſt, impoſed, and forfeited to our ſovereign lord the king, at the general quarter ſeſſions of the peace of our ſaid lord the king, holden at — in and for the ſaid county of — on — the — day of — in the — year of the reign of — before — eſquires, juſtices of our ſaid lord the king, aſſigned to keep the peace in the ſaid county, and alſo to bear and determine divers felonies, treſpaſſes, and other miſde-meanors in the ſaid county committed, Joſhua Nicholson, gentleman, clerk of the peace for the county aforeſaid, then and there attending:

Of A. O. late of — in the ſaid county, labourer, for a treſpaſs and aſſault at — aforeſaid in the ſaid county, whereof he is indicted and convicted; his fine ſet at five ſhillings, which he paid to the ſheriff in court

l. s. d.
0 5 0
Of

Of A. O. of — in the said county, yeoman, because he come not now here to answer to such things as against him, on the part of our said lord the king, should be objected, as by a certain recognizance taken before J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, he undertook — — — 1 s. d.

Of A. S. of — in the said county, yeoman, one of the pledges of the said A. O. because he had him not to answer as above — — — 10 0 0

Of B. S. of — in the said county, yeoman, the other of the pledges of the said A. O. for the like — — — 5 0 0

Eves Droppers.

EVES droppers are such as listen under walls or windows, or the eves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales; are a common nuisance, and presentable at the court leet; or are indictable at the sessions, and are punishable by fine; and are to find sureties for their good behaviour. 4 Black. Com. 168.

And Dalton says that *Night-walkers*, that eve drop men's houses, or cast men's gates, carts, or the like, into ponds, or commit other outrages or misdemeanors in the night; or shall be suspected to be pilferers, or otherwise like to disturb the peace, or that be persons of ill behaviour, or of evil fame or report generally, or that shall keep company with any such, or with any other suspicious person in the night; are liable to find sureties for their good behaviour.

Evidence.

- I. Of evidence in general.
- II. Of written evidence.
- III. Of the evidence of witnesses.
- IV. Of process to cause witnesses to appear.
- V. Of the manner of giving evidence.

I. Of evidence in general.

Evidence, what.

EVIDENCE in legal understanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under seal, as charters and deeds, and other writings without seal, as court rolls, accounts, and the like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given, for the finding of any issue joined between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. *1 Inst.* 283.

The best evidence is required.

But it is a general rule in all cases, civil and criminal, the best evidence that may be had, or that the nature of the thing will bear, is to be given; and it is upon this reason, that a copy of the record is admitted, because one cannot have the record itself; but a copy of a copy will not do. *Law of Evid.* 286.

Prefumptive evidence.

Many times juries, together with other matter, are much induced by presumptions: whereof there are three sorts, violent, probable, and light or temerary. Violent presumption many times amounts to full proof; as if one be ran through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house, with a bloody sword, and no other man was at that time in the house. Probable presumption moveth little; but light or temerary presumption moveth not at all. *1 Inst.* 6.

Witnesses to a deed being dead.

If all the witnesses to a deed be dead, (as no man can keep his witnesses alive, and time weareth out all men,) then violent presumption, which stands for a proof, is continual and quiet possession; altho' the deed may receive credit from a comparing of seals, writing, and the like. *Id.*

What number of witnesses are required.

The common law did not require any certain number of witnesses, for the trial of any crime whatsoever. *2 Haw.* 428.

And

And before a justice of the peace in divers cases, one witness is sufficient to convict an offender; the same being directed by special statutes.

But in case of high treason, whereby corruption of blood shall be made, no person shall be attainted, but upon the oaths of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason. *7 W. c. 3. s. 2.*

But in *Gabagan's* case at the *Old Bailey*, *Jan. sess. 1748*, it was determined, that a conviction of high treason may be upon the evidence of one witness, in all cases where there is no corruption of blood. *Leach's Crown Law. 39.*

And in those courts which proceed by the rules of the civil law, as the spiritual court, and the courts of equity, two witnesses are generally required: and the reason why the civil law requires two witnesses is, because their trial is by witnesses, and not by a jury of twelve men. But where the trial is by verdict of twelve men, there the judgment is not given upon witnesses, or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. *1 Inst. 6. b. Plowd. 12. a.*

By *29 C. 2. c. 3. s. 5.* Devises of lands shall be attested by three witnesses at the least.

II. Of written evidence.

Acts of parliament relate either to the kingdom in general, and are therefore called *general* acts of parliament; or only to the concerns of private persons, and are thence called *private* acts of parliament, *Theory of Evid. 2.*

A *general* act of parliament is taken notice of by the judges and jury, without being shewed; and hence it is that it hath been said, that the printed statute book is good evidence of general acts of parliament; not that the printed statutes are the perfect and authentic copies of the records themselves, but every person is supposed to know the law; and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. *Id. 2. 8.*

But in the case of *private* acts of parliament, the printed statute book is not evidence, though reduced into the same volume with the general statutes; but the party ought to have a copy compared with the parliament roll; for they

are not considered as already lodged in the minds of the people. *Id.*

However, a private act of parliament, that is in print, which concerns a whole county (as the act of *Bedford Level*) or a large body of people (as the whole clergy in general) hath been allowed to be given in evidence, without comparing it with the record; and these things are the rather admitted, because they gain some authority from being printed by the king's printer, and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. *Id.* 8.

Records of
courts.

Records of the king's courts prove themselves, and cannot be proved by witnesses. But copies of them must be proved by witnesses, and then they are good evidence. No rasure or interlining shall be intended in them. But the surest way is, to exemplify a record under the great seal, or at least under the seal of the court. 10 Co. 92.

And nothing shall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read Evid.*

But a record of a criminal conviction shall not be given in evidence in a civil action; because such conviction might have been upon the evidence of a party interested in the civil action. *Cases in the time of L. Hardwicke*, 312.

Rolls of court
not of record.

There are also other publick matters that are not records, as *court rolls*, and transactions in *chancery*; and of these, copies may be given in evidence. *Theory of Evid.* 22, 23.

The reason why the proceedings in chancery are not record is this, because they are not the precedents of justice; for the judgment there is, according to equity and good conscience, and not according to the laws and customs. And the reason why any record is of validity and authority is, because it is a memorial of what is the law of the nation; now chancery proceedings are no memorials of the laws of *England*, because the chancellor is not bound to proceed according to the laws. *Id.* 23.

The rolls of a *court baron* are evidence; for they are the publick rolls, by which the inheritance of every tenant is preserved; and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district. *Id.* 43.

Depositions.

Depositions of witnesses may be read when the witness is dead, but not when the witness is living: for whilst the

the witness is living, they are not the best evidence the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witness is *sought and cannot be found*; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *Id.*

So if it is proved that a witness was subpoenaed, and *fell sick by the way*; for in this case likewise, the deposition is the best evidence that can be had, and that answers what the law requires. *Id.*

But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. For this reason, depositions in chancery shall not be read for or against the defendant upon an information or indictment, for the king was no party to the suit. *Id.*

Yet this rule admits of some exceptions; as particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more credit than what another person swears he hath heard him say. So a deposition taken in a cause between other parties, will be admitted to be read, to contradict what the same witness swears at a trial. *Id.* 30, 31.

It is a general rule, that *depositions taken in a court not of record*, shall not be allowed in evidence elsewhere. So it hath been holden in regard to depositions in the ecclesiastical court, tho' the witnesses were dead. So where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence. *Id.* 33, 34.

But it seems to be settled, that the *examination of an informer* taken upon oath, and subscribed by him, either before a coroner upon an inquisition of death, or before justices of the peace, in pursuance of the statutes of *Phil. & Mar.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the satisfaction of the court, that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever. 2 *Haw.* 429.

But it hath been adjudged, that it is not sufficient to authorize the reading of such examination, to make oath that

the prosecutors have used all their endeavours to find the witness, but cannot find him. 2 *Haw.* 430.

But it is said to have been adjudged, by the court of King's bench, in the 7 *W.* (1 *Salk.* 281.) upon advice with the justices of the common pleas, on an indictment for a *libel*, that depositions taken before a justice of the peace, relating to the fact, could not be given in evidence, though the deponent were dead; and that the reason why such depositions may be given in evidence in *felony*, depends upon the statutes of *Phil. & Mar.* and that this cannot be extended farther than the particular case of felony. But in the report of this case, 5 *Mod.* 165. it is said, that the reason why such depositions could not be read, was because the defendant was not present when they were taken, and therefore had not the benefit of a cross-examination. 2 *Haw.* 430.

Anciently, depositions taken in *perpetuam rei memoriam* were not published till after the death of the witnesses, because they were no evidence while the witnesses were living; but this practice was found very inconvenient, because thereby witnesses became secure in swearing whatever they pleased, inasmuch as they never could be prosecuted for perjury. *Theory of Evid.* 32.

What a man himself, who is living, hath sworn at one trial, can never be given in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man hath sworn at one trial different from what he hath sworn at another, this is good evidence as to his discredit. *Id.* 35.

Verdict.

No verdict shall be given in evidence, but between such who were parties or privies to it; because otherwise a man would be bound by a decision, who had not the liberty to cross examine: and nothing can be more contrary to natural justice, than that any body should be injured by a determination, that he, or those under whom he claims, was not at liberty to controvert. *Theory of Evid.* 18, 19.

And a verdict will not be admitted in evidence, without likewise producing a copy of the judgment founded upon it; because it may happen, that the judgment was arrested upon a new trial granted. But this rule doth not hold, in the case of a verdict on an issue directed out of chan-

cery ; because it is not usual to enter up judgment is such case ; and the decree of the court of chancery is equally proof that the verdict was satisfactory, and stands in force. *Theory of Evid.* 21.

A decree in chancery may be given in evidence between the same parties, or all claiming under them ; for their judgments must be of authority in these cases, where the law gives them a jurisdiction : for it would be very absurd, that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. *Id.* 36, 37. Sentence or final judgment.

And note, wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter : and in case the determination is final in the court, of which it is a decree, sentence, or judgment, such decree, sentence, or judgment will be conclusive in any other court having concurrent jurisdiction. *Id.* 37.

In the case of *Benson and Olive* in the exchequer, T. 3 G. 2. a deed was offered to be produced, which bore date 38 years before, without proving that the witnesses were dead. And allowed by the court. They said that in general 40 years was allowed to be the rule ; but the courts never tied themselves up strictly to that rule, but 39, 38, nay 35, have been allowed the same. 1 *Barnard.* 348. Ancient deed.

And, E. 11 G. 2. *Porter and Gordon.* Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands ; which was opposed by the other side ; but admitted by the court, who said, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. 12 *Vin.* 57.

In cases where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like ; the law, in such cases of necessity, allows them to be proved by witnesses. *Jenk.* 19. *Wood. b.* 4. c. 4. Writings lost or concealed.

If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it ; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. *L. Raym.* 731.

Where the defendant himself has the deed which concerns the land in question, and refuses (after notice) to produce

duce it: a copy thereof will be permitted to be given in evidence, on its being proved to be a true copy. And if the party has no copy, he may produce an abstract, nay even give parol evidence of the contents; because in such case it may be impossible to give better evidence. In *civil* causes, the court will sometimes oblige parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption, to the jury. The court will do it, in many cases, under particular circumstances, by rule before the trial; especially, if the party from whom the production is wanted applies for a favour. But in a *criminal* or *penal* cause, the defendant is never forced to produce any evidence; though he should hold it in his hands in court. *Theory of Evid* 54. Burr. Mansf. 2489.

Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause; sufficient probability must be shewed to satisfy the court, that the original note was genuine, before the copy will be allowed to be read. 1 *Atk.* 446.

But by *L. Hardwicke*, Ap. 16, 1740. On exceptions to a master's report. Where a rent charge is granted by deed, and the deed happens to be lost, the plaintiff cannot read a copy in evidence at law, but must either set up a prescriptive title to the rent, from a constant and uninterrupted payment, or he must bring his bill in equity, to be relieved against the accident of the original's being lost. And the same rule holds in case of a bond; for though an hundred witnesses could prove the substance of it, yet it is not sufficient at law, for the plaintiff must declare upon it, setting forth that he produceth it in court. 2 *Atk.* 61.

And in the case of *K. v. Metherrington*, *H.* 36 G. 3. which was upon an appeal against an order of removal. It appeared at the sessions, that the order of removal and duplicate were lost, whereupon parol evidence of the existence of such order, and the pauper's removal under the same, were allowed; which, the court said, was legal and sufficient evidence of it. *Durnf. and East*, 6 V. 556.

An indenture to guide the uses of a common recovery, was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402.

To prove the taking of an oath, in the act of uniformity, a certificate was produced that had only a small piece of wax upon it. By *Twisden*; if it were sealed, tho' the
seal

Writing with
the seal torn
off.

seal was broken off, yet it may be read, as we read recoveries after the seal broken off; and he said, he had seen an administration given in evidence after the seal broken off, and so wills and deeds. 11 *Mod.* 11. *M.* 21 *C.* 2. *Clerk and Heath.*

If upon collateral issue, it is to be proved, that such a one was justice of the peace, baronet, or the like; common reputation is sufficient proof, without shewing the commission, or letters patent of the creation. *Tr. per pais,* 347. Letters patent,

The copy of the probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original, taken by authority, and of a publick nature: otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates; therefore such probate is but a copy, and the copy of it is no more than the copy of a copy. 3 *Salk.* 154. Copy of a will
or of letters of
administration,

The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore where a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. So would the book of the ecclesiastical court, wherein was entered the order for granting administration. So would the copy of the probate of a will be evidence of such an one being an executor, but a copy of the will would not be evidence of it. *Kempton and Croft, E.* 8 *G.* 2. *Buller's Nisi Prius,* 246.

So the copy of the court roll of a manor is good evidence; as also the copy of a church-register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *Skin.* 584. *L. Raym.* 154. Other copies.

And generally, wherever an original is of a publick nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154. *H.* 8 *W. Lynch and Clarke.*

On a warrant to a constable to distrain goods by virtue of an act of parliament; the constable makes distress and returns the overplus to the offender, but keeps the warrant. Resolved, that a copy of the warrant in this case will be good evidence. 6 *Mod.* 83. *M.* 2 *An. Marley and Staker.*

So

So a copy of a *conviction for killing game* was agreed to be evidence in bar of an action brought for the same offence. *T. 5 G. 3. K. and Midlam. Burr. Mansf. 1720.*

Inquisition post mortem. An inquisition *post mortem* is evidence, but not conclusive. *2 T. Jones 224. M. 34 C. 2. Earl of Thanet v. Foster.*

Parish register. The entry of the names and titles of persons in a *church-book*, either for marriages or births, is evidence, but not conclusive evidence, of the marriage or birth of any persons, unless the identity of the person (by such entries intended) is fully proved, and also strengthened with circumstances, as cohabitation, the allowance of the parties themselves, and the like. *12 Vin. 89.*

Heralds books. Rolls or ancient books in the *heralds office* are evidence to prove a pedigree; but an extract of a pedigree, proved to be taken out of records, shall not; because such extract is not the best evidence in the nature of the thing, as a copy of such records might be had. *Theory of Evid. 45. 3 Black. 105.*

Bounder roll. An old *terrier*, or *survey of a manor*, whether ecclesiastical or temporal, may be given in evidence; for there can be no other way of ascertaining the old *tenures* or boundaries. *Theory of Evid. 44.*

Terriers. A *terrier of glebe* is not evidence for the parson, unless signed by the churchwardens, as well as the parson; nor then neither, if they be of his nomination: and tho' it be signed by them, yet it seems to deserve very little credit, unless it is likewise signed by the substantial inhabitants. But in all cases, it is certainly strong evidence against the parson. *Id. 45.*

Indorsement of interest on a bond. *M. 11 G. Serle and lord Barrington.* The *indorsement on a bond by the obligee*, of payment of interest, was allowed to be given in evidence by his administrator, to take off the presumption from the length of time. *L. Raym. 1371.*

Shop book. By the *7 Y. c. 12.* No tradesman nor handicraftsman shall be allowed to give his *shop-book* in evidence, on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for any thing directly falling within the compass of their mutual trades and merchandize.

In the case of *Pitman and Maddox, 11 W.* A *shop-book* was allowed for evidence, it being proved that the servant

servant that writ the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was required of the delivery of the goods; and *Holt Ch. J.* said it was as good evidence as the proof of a witness's hand to an obligation; and he held, that tho' the statute of the 7 *J.* says, a shop book shall not be evidence after the year, yet it is not of itself evidence within the year. 2 *Salk.* 690.

A man's *book of accounts* is no evidence for the owner of the book, but for the adverse party; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per Pais*, 348.

Book of accounts.

In the case of *Barry v. Bennington*, *H.* 32 *G.* 3. it was determined, that on an action of trespass where the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived, in a common day book, are admissible evidence, if such steward be dead. *Durnf. and East*, 4 *V.* 154.

Stewards book.

In the case of the *Queen and Mead*, the defendant and eight others, were incorporated under an act made 39 *El.* by the name of the surveyors of the highways at *Ailesbury* in the county of *Bucks*, and were trustees of a charity called *Bedford's* gift. An information was preferred against the defendant, for executing this office, being an office of trust, without having taken the oaths, contrary to the 25 *C.* 2. *c.* 2. To which he pleaded not guilty. And now it was moved for a rule, that the prosecutor might have two books produced, which these surveyors kept, in which they entered their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. But it was denied by the court; because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution. *L. Raym.* 927.

Private books of entries.

A copy of an inscription on a grave-stone, hath been allowed to be given in evidence.

Inscription on a grave-stone.

The examination of an almanack, that such a day of the month was *Sunday*, was ruled to be sufficient; and that a trial of this by a jury is not necessary, altho' it is a matter of fact. *Cro. Eliz.* 227.

Almanack.

And the reason why the kalendar in an almanack is allowed as evidence seemeth to be, because the said kalendar is part of the book of common prayer, which is established by act of parliament.

An

Father's entry
of the child's
birth.

An almanack wherein the father had writ the day of the nativity of his son, was allowed as evidence to prove the nonage of his son. *Raym.* 84.

General history.

Camden's Britannia was offered in evidence, to prove a particular custom, but refused; for the court held, that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it; but not to prove a particular right or custom: So in the case of *St. Katherine's* hospital, *Holt* Ch. J. allowed a chronicle to be evidence of a particular point of history in *Edward* the third's time: So a year book may be evidence to prove the course of the court. And in this case it was admitted, that heralds books are good evidence as to pedigrees, and parish registers as to births and marriages, upon the nature of the thing. But in the exchequer, the question being whether the *Abbey de Fontibus* was an inferior abbey or not, *Dugdale's Monasticon* was refused for evidence, because the original records might be had in the augmentation office. *1 Salk.* 281. *7 W. Stainer* and the *Burgesses of Droitwich*.

So in the case of *Cockman* and *Mather*, *E.* 13 G. On a trial at bar, concerning the right of visiting *University* college in *Oxford*, one of the issues was, whether king *Alfred* was founder. And the counsel for the plaintiff would have given in evidence several historians as to this point. But the chief justice declared, that such evidence is never admitted, unless in proof of a point concerning the publick government. And the evidence was not allowed. *Barnard.* 14.

Similitude of
hands.

It seems to have been generally holden, since the reversal of the attainder of *Algernon Sydney*, that similitude of hands is not evidence in any criminal case, whether capital or not capital. *2 Haw.* 431. *L. Raym.* 39.

And, generally, it is said, that similitude of hands is no evidence; but saying that he was well acquainted with his writing, and knew it to be the party's, is evidence. *12 Vin.* 204.

And in general cases, the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it, tho' he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write; as where a
7 parson's

parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish books, in which was the same person's name, was permitted to swear to the similitude of the handwriting, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. *Theory of Evid.* 25, 26.

So in the case of *Gould and Jones*, T. 2 G. 3. On the trial of an issue out of chancery, before lord Mansfield at the sittings in *Middlesex*, where it was disputed, whether the name of one *William Jones*, subscribed to a declaration of trust, was genuine; and, to prove the hand-writing forged, a witness was produced, who had frequently corresponded with *Jones*, but had never seen him write: Lord Mansfield, upon debate, held him to be a good evidence, and his testimony accordingly was admitted. *Black. Rep.* 384.

III. Of the evidence of witnesses.

It seems that the confession of the defendant, whether taken on an examination before justices of the peace, in pursuance of the 1 & 2 P. & M. c. 13. or 2 & 3 P. & M. c. 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within these statutes, or in discourse with private persons, hath always been allowed to be given in evidence against the party confessing, but not against others. 2 *Haro.* 429.

It is to be observed, that there be many circumstances that disable a juror, that are not sufficient exceptions against a witness: Thus the exception of kindred is a good cause of challenge against a juror, but not against a witness; therefore the father may be a competent witness for or against his son, or the son for or against his father. These and the like exceptions may be to the credit or credibility of the witness, but are not exceptions against his competency. 2 *H. H.* 276.

For, that I may observe it once for all, the exceptions to a witness are of two kinds. 1. Exceptions to the credit of the witness, which do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury. 2. Exceptions to the competency of the witness, which do exclude

Confession.

Witness of kin to the party.

Difference between a credible and a competent witness.

clude him from giving his testimony, and of these exceptions the court is the judge. 2 H. H. 276, 277.

Witness infam-
ous.

It seems agreed, that an attainder, judgment, or conviction of treason, felony, piracy, præmunire, perjury, or forgery on 5 El. and also a judgment in attainr for giving a false verdict, or in conspiracy at the suit of the king, and also judgment for any heinous crime to stand on the pillory, or to be whipped or branded, are good causes of exception against a witness, while they continue in force. 2 Haw. 432. *Theory of Evid.* 107. *Buller's Ni. Pr.* 291.

Witness con-
victed of petit
larceny.

In the case of *Pendock and Maskender*, H. 28 G. 2. the question was, whether a person convicted and whipped for *petit larceny* shall be allowed to be a witness. And the court were clearly of opinion that he shall not; and laid it down as a rule, that it is the crime that creates the infamy, and not the punishment for it. *Petit larceny* is felony; and there is no case where a person convicted thereof was ever admitted to be a witness. 2 *Wils.* 18.

But by the 31 G. 3. c. 35. after reciting, that persons convicted of grand larceny are by their punishment restored to their credit as witnesses, but that persons convicted of petty larceny remain incompetent; It is enacted, that no person shall be an incompetent witness by reason of a conviction for petty larceny.

Witness not to
accuse himself.

Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. *Id.*

And a man shall not be permitted to swear, that he was suborned and perjured. *St. Tr. V.* 3. 427.

And *L. Coke* says, a witness alleging his own infamy or turpitude, is not to be heard. 4 *Inst.* 279.

Thus a wife was disallowed to be a witness to prove her husband had no access to her in a case of bastardy. *Seff. Cases*, V. 2. 175. *K. and Reading*, M. 8 G. 2.

But in the case of *K. v. Bramley*, the court said, that the reputed mother is a competent witness to prove the illegitimacy of her child. *Durnf. and East.* 6 V. 330. (a)

(a) See this case and several others on the same subject, title BASTARDS, l.—And also POOR. (*Settlement by Marriage.*)

It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. *Id.* Witness convicted of felony.

And it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder, restores the party to his credit. 2 *Haw.* 433.

Infidels cannot be witnesses, that is, such who profess no religion that can bind their consciences to speak truth. But when any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion; for it would be ridiculous to swear a witness upon the holy evangelists, who did not believe those writings to be sacred. Thus *Jews* are always sworn upon the old testament; *Mahometans* on the koran; those of the *Gentoo* religion according to the ceremonies of that religion. *Buller's Ni. Pr.* 292. Infidels, Jews, Mahometans, and Gentoo.

Want of discretion is a good exception against a witness; on which account alone it seems; that an infant may be excepted against. 2 *Haw.* 434. Witness wanting discretion.

But if an infant be of the age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear that he hath a competent discretion, he may be sworn. 2 *H. H.* 278. Witness being an infant.

And in many cases an infant of tender years may be examined, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, burglary, and such crimes as are practised upon children. 2 *H. H.* 279. 284. (a)

But in no case shall an infant be admitted as evidence, without oath. *Str.* 700. 1 *Atk.* 29. Witness must be sworn.

And in *Powell's* case tried before *Gould J.* at *York* 1775, which was an indictment for a rape. The prosecutrix was an infant between 6 and 7 years of age; and upon the presumption of law, that a child under the age of 7 years is incapable of understanding the nature of an oath, and is therefore incompetent to take it, she was admitted to give her evidence against the prisoner without being sworn.

(a) For more on this subject, see title INFANTS.

The prisoner was acquitted upon her testimony. The judge however conceiving that by law, every prisoner must be convicted upon legal evidence, and that, especially in criminal cases, no evidence can be legal unless it is given upon oath, he mentioned the case to the judges; and a majority of them were of opinion, that in criminal cases no testimony can be received except upon oath. *Leach's Cr. Law*, 104.

And in the case of *K. v. Brafter* in the year 1778, it was determined in the same manner. *Leach's Cr. Law*. 104. (a)

And Mr. J. Buller says, in regard to children, there seems to be no precise time fixed wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the court. However it seems to be settled, that a child under the age of ten shall in no case be admitted; but after that age, if the child appear to have any notion of the obligation of an oath, after there has been a foundation laid by other witnesses to induce a suspicion, the child shall be admitted to prove the fact. Doubtless the court will more readily admit such a child in the case of a personal injury (such as rape) than on a question between other parties; and perhaps in such case, would even admit the infant to be examined without oath; for certainly there is much more reason for the court to hear the relation of the child, than to receive it at second hand from those that heard it say so. In cases of foul facts done in secret where the child is the party injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law; yet the levity and want of experience in children, is undoubtedly a circumstance which goes greatly to their credit. *Buller's Ni. Pr.* 293.

Witness being a
Quaker.

Witness inter-
ested.

By 7 & 8 *W. c.* 34. no Quaker shall be allowed to give evidence in any criminal cause, except upon oath.

It seems an uncontested rule in all cases, that it is a good exception against a witness that he is either to be a *gainer* or *loser* by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433.

Thus in an information upon the statute of *usury*, the party to the usurious contract shall not be admitted to be a

(a) See this case, title INFANTS.

Witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst* 6.

Thus also an *attorney* ought not to be examined against his *client*, because he is obliged to keep his secrets: but of his own knowledge before retainer, he may be examined as a witness, if served with a subpoena. *Wood. b. 4. c. 4.*

But upon an indictment for *battery*, or the like, the party grieved may be a witness against the defendant, because the prosecution is at the suit of the king. *Ib. c. 5.*

And by 27 G. 3. c. 29. where pecuniary penalties or parts thereof are given to the *poor*, the inhabitant of any place may be a competent witness to prove an offence, though the place may be benefited by the conviction of the offender, unless the penalty exceed 20 l.

And in many *criminal cases*, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be entitled to restitution: and yet his evidence is admitted. So in removing an indictment by certiorari from the sessions to the king's bench; tho' the prosecutor in that case, if the defendant be convicted, is entitled to his costs, yet he is allowed as a witness. So where a man, in case of conviction of the offender for a robbery, will be entitled to a 40 l. reward; yet his evidence shall be received. And by *Parker Ch. J.* As to the cases where a 40 l. reward is given, they admit of this answer; that the intention of those acts would be quite defeated, if so be the reward should take off the evidence. The same answer may serve to the cases put upon an indictment of felony for stolen goods; and where the indictment is removed by certiorari: for none in the first case but the owner can prove the property of the goods; and in the second, if the giving of costs should take off the evidence of the prosecutor, the act of parliament designed to discountenance the removing of suits by certiorari, would give the greatest encouragement to them that is possible. 10 *Mod.* 193; 11. 12 *An. Q. and Muscot.*

Also it seems agreed, that it is no good exception against a witness, that he has a *maintenance from the king*; for every one may maintain his own witnesses. 2 *Haw.* 434.

Thus also, one *commoner* may be a witness for another *claiming common*, because in effect it charges himself; that is to say, he admits another to have common with himself. But if the prescription be, that all the inhabitants of such a place ought to have common there, one of the inhabitants cannot be a witness, to prove that another of the said inhabitants ought to have common there, because in effect he would swear to give himself right of common there. *L. Raym. 731.*

A *trustee* may be a witness, if he hath released his trust; but not if he hath conveyed it over. *Sid. 315. M. 18 C. 2. Stevens and Gerrard.*

An *heir at law* may be a witness concerning the title to the land, but the remainder-man cannot, for he hath a present interest, but the heirship is a mere contingency. *1 Salk. 283. M. 10 W. Smith and Blackburn.*

In evidence to a jury at bar, a special issue by rule of court was directed to try the custom of lady *Percie's* manor of *Westward* in *Cumberland*, whether fines on the tenants on their lord's death, be due to the heirs or successors of the lord, during his minority; the defendant excepted to the steward, because he had a fee on admission, but it was not allowed, and he was sworn. *3 Keb. 90.*

A witness laying a *wager* in the cause, is no hindrance to his being a witness; for the other has an interest in his evidence which he cannot deprive him of. *Farest. 31. Str. 652.*

If a person apprehends himself to be interested, tho' in strictness of law he is not, yet he ought not to be sworn: as where the witness for the plaintiff apprehended that if the plaintiff should recover, he would remit a claim of some money which he (the plaintiff) had upon this witness; but if he should not recover, he would not remit it; although in strictness of law, his recovering or not recovering in that case would not alter the claim: or as in case where the witness owned himself to be under an honorary, though not under a binding engagement, to pay the costs. *Str. 129.*

If a man hath been examined on interrogatories, being at that time disinterested, and afterwards becomes interested, his deposition may be given in evidence; because his evidence must be taken as it stood at the time of his examination. So if a witness to a bond becomes afterwards representative of the obligee, his hand must be proved in like manner as if he were dead. *2 Atk. 615. 2 Vesey 44.*

In

In the case of *K. v. Proffer* and others, *M* 31 G. 3. On an appeal against a *poor rate* setting forth, that several persons were omitted in the rate who possessed rateable property. Objection was taken on hearing the appeal to the evidence of several persons on account of their being *liable* to be rated, altho' they were *not in fact* rated. The sittings being of opinion that such testimony was incompetent, refused to receive the same.——But by *L. Kenyon* Ch. J. (*inter alia*): The poor rates are made for a short space of time only; they are adapted to the situation of the parish at the time they are made, and persons who are liable to be rated one month may not be so in the next. The rateability of one person cannot effect that of another; and therefore whatever rateable property one person may have in the parish, yet as his name is not inserted in the rate, his testimony was improperly rejected.——*Buller* J. I have often heard *L. Mansfield* say, that the question whether the evidence be admissible or not, depends on the subject matter to which it is applied. In his case a witness is called to prove that the appellants have rateable property, who is himself liable to be rated, but is not rated. It has been argued, that a person who is liable to be rated only, is equally an incompetent witness, as if he were actually rated; but there is a material difference between the two cases. It has been settled in so many cases *at nisi prius* that the liability to be rated is no objection to his being called as a witness, that it is now considered as an established point. The first question on this subject arose before *Mr. Baron Burland* at *Salisbury*, in an action on a penal statute, which gave part of the penalty to the parish; and a person being called as a witness to support the action who was liable to be rated to the poor, it was objected that such liability rendered him incompetent; but that learned judge said, that as he was not rated, he had not an immediate interest at that time, and the witness was admitted. The same point has since been repeatedly ruled by different judges. The rule stated by one of the counsel, that the witness is to be totally indifferent at the time when he is examined, is not accurate: if such a rule were to prevail, every objection which now goes to the credit of the witness only, would render him incompetent. That rule more properly applies to *jurors*, who are rejected on very slight grounds. I take the rule to be this; that if the witness can derive no benefit from the cause then

before the court, he is competent.—*Grose J.* of the same opinion. Order of sessions quashed. *Durnf. and East*, 4 V. 17.

And in the case of *K. v. South Lynn*, T. 34 G. 3. upon an appeal respecting a settlement, one *Charles Newman*, the owner of a house and other estates in the parish removed from, and also occupier of a small garden ground in the same parish, also his own property; and one *Simon Newman*, who is also an occupier of a dwelling house in the same parish of 5 l. a year, but neither of them assessed to the poor's rate there, were produced as witnesses, but rejected by the court on the ground of their being rateable, and therefore interested in the event of the appeal.—*Harvey* and *Perceval* endeavoured to shew, that this case was different from the above case of *K. v. Proffer*, for here the witnesses have a permanent property in the parish for which it is found they were liable to be rated, and are directly interested in defeating the settlement in their own parish, as they would be liable to the future maintenance of the pauper. Otherwise the reason for admitting the competency of these witnesses will also extend to admitting the evidence of a parishioner who is in fact rated, provided he has paid the rate; because it may equally be said in that case, that such person having paid his quota, can have no interest in the application of the money collected under it; and in both cases the party is liable to all future rates. *L. Kenyon Ch. J.* said, that with respect to the competency of these witnesses, I see no reason to depart from the opinion given in the case of *K. v. Proffer*, *Durnf. and East*, 5 V. 664.

But in the case of *Swire v. Bell, &c.* M. 34 G. 3. it was determined, that if the subscribing witness to a bond given to indemnify a parish against the charge of a bastard child, be interested in such parish, as well at the time of the attestation, as at the trial; he cannot be examined as a witness to prove the execution thereof; nor is proof of his hand-writing sufficient for that purpose. *Durnf. and East*, 5 V. 371.

In the case of *K. v. Little Lumley*, H. 35 G. 3. The quarter sessions for *Durham* quashed an order for the removal of *J. Greenwall* an idiot, from *Little Lumley* to *Lamesley*; subject to the opinion of this court on the following case. The respondents, to prove the birth of the pauper, called *E. Morallee* an inhabitant of *Lamesley*, not rated to, nor paying any parochial taxes, but on the

contrary receiving relief from the township; but she declined to give her evidence *voluntarily*; they then called *S. Hall*, wife of *W. Hall*, to identify the pauper, who were inhabitants of *Little Lumley*, but were not rated to nor pay any parochial taxes. The sessions being of opinion that *E. Micalles* was not compellable to give evidence on the part of the respondents, and that *S. Hall* was inadmissible, on account of her being an inhabitant of *Little Lumley*, refused to examine her, and the respondents not producing any other witness, the appeal was allowed.—The court said that the mere circumstance of the inhabitancy (a) did not create an interest in the last witness called, so as to make her an incompetent witness, and there was no reason why the former should not be compelled to give evidence; and they ordered the case to be sent back to the sessions to be heard. *Durnf. and East*, 6 V. 157.

It seems agreed, that the husband and wife being as one and the same person in affection and interest, can no more give evidence for one another, in any case whatsoever, than for themselves; and that regularly the one shall not be admitted to give evidence *against* the other, nor the examination of the one be made use of against the other, by reason of the implacable dissention which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case. Yet some exceptions have been allowed in cases of evident necessity; as in the lord *Audley's* case, who held his wife, while his servant by his command ravished her; or where a man is indicted for a forcible marriage on the statute of the 3 H 7. or where either a husband or wife have cause to demand sureties of the peace against the other. 2 *Haw.* 431, 432.

H. 28 G. 3. *K. v. inhabitants of Cliviger.* This was a case upon a settlement. On hearing the appeal, *J. Whitehead* the pauper was called by the respondents to prove his marriage with *Margery*, who was removed along with him as his wife, which marriage he swore to; he afterwards was called by the appellants to prove a former marriage with one *Elen*, when he swore he never was married to her. *Elen* was then called to prove her mar-

Husband and
wife.

(a) See *K. v. Proffer*, *Ante* under this head.

riage with him, but her evidence was refused by the sessions, because such evidence shewed him to have been guilty of bigamy. And it was holden by the court, that a wife shall not be called in any case to give evidence, even tending to criminate her husband. *Durnf. and East*, 2 V. 263.

Also in the case of *Davis v. Dinwoody*, E. 32 G. 3. it was determined that husbands and wives cannot in any case be witnesses either for or against each other. *Durnf. and East*, 4 V. 678.

Judge or juror
being a witness.

It seems agreed, that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him. 2 *Haw.* 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr. Evid.* A. 2.

Witness being
an accomplice.

It hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. 2 *Haw.* 432.

Also it hath been often ruled, that accomplices who are indicted are good witnesses for the king, until they be convicted. *Id.*

Also it hath often been adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others. *Id.*

It hath been also adjudged, that where three persons are sued in three several actions on the statute for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another. *Id.*

Witness an alien
or bondman.

It seems agreed, that it is no good exception against a witness, that he is an alien, or villein, or bondman. 2 *Haw.* 434.

Witness blind.

There were two witnesses to a deed, and one of them was blind. It was ruled by *Holt Ch. J.* that such deed might be proved by the other witness, and read; or might be proved, without proving that this blind witness is dead; or without having him at the trial, proving only his hand. *L. Raym.* 734. *Wood and Drury.*

Witness over
sea.

If a witness is beyond the sea, it is usual to prove his hand, and that he is beyond the sea. 12 *Viner* 224.

There

There were two witnesses to a bond; one in *Africa*; and the other in Bedlam, mad: On an order to prove an exhibit *viva voce* in chancery, a witness proved these facts, and their hands to the bond as if dead. *T. 5 & 6 G. 2. 12 Viner 224.*

Witness become insane.

In the case of *Doe* on the several demises of *Church* and *Phillips* against *Perkins* and others, *T. 30 G. 3.* it was adjudged, That a witness may refresh his memory by any book or paper, provided he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, then the *original* book or paper must be produced, for he shall not be allowed to give evidence from a copy or extract from it. *Durnf. and East, 3 V. 749.*

Witness may refresh his memory from papers, &c.

If a witness to a deed is dead, it is not sufficient to prove his hand-writing, but it must be proved also that he is dead. *2 Atk. 48.*

Witness dead.

And where a person has lived abroad for some years, after attesting a deed, there must be strict proof of his death: Otherwise it is, where the witness has lived constantly in *England*, from the time of subscribing his name to the day of his death; for in that case, a slight evidence of his death is sufficient, especially where the person who proves his hand knew him intimately, who swears that he believes him dead. *Id.*

But where the witness is dead, it is sufficient to prove the witness's hand, without proving the hand of the party. *12 Viner 224.*

The sayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general usages and customs; but as for a particular fact, lying in the knowledge of a particular person, by his death the evidence is lost. *St. Tr. V. 5. 456.*

And it hath been agreed, that the evidence given by a witness at one trial, cannot in the ordinary course of justice be made use of against a defendant, on the death of such witness at another trial. *2 Haw. 430.*

In the case of murder, what the deceased declared after the wound given, may be given in evidence. *12 Viner 118.*

But where such declaration is reduced into writing, the writing itself must be produced, and not evidence thereof given *viva voce*. *Id. 119.*

Hearsay.

It is a general rule that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; for if the first speech was without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. But tho' hearsay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. So where the issue is on the legitimacy of a person, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which altho' not to be given in evidence directly, yet they may be assigned by the witness as a reason for his belief one way or other. So hearsay is good evidence to prove who was a man's grandfather, when he married, what children he had, and the like, of which it is not reasonable to presume that there is better evidence. So to prove that a man's father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation: and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Evid.* 111, 112.

So in establishing a title to an estate upon a pedigree, evidence that a man has not been heard of for many years, is sufficient evidence *prima facie* to prove him dead without issue, so as to put the opposite party upon proof that he still exists. Many persons go to the *East* and *West Indies*, and are never heard of more. In the mean time what is done upon such a trial is no injury to the man or his issue, if he or they shall afterwards appear and claim the estate. *Black. Rep.* 404.

Hearsay

Hearsay evidence from a wife whose husband is living abroad, of his declaration respecting his settlement, is admissible when supported by slight circumstances. *K. v. Holy Trinity in Warham, M. 22 G. 3. Cald. Cas. 141.*

IV. Of process to cause witnesses to appear.

The compulsory means to bring in witnesses, are of two kinds. 1. By process of *subpœna* (A) issued in the king's name by the justices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal cases), the justices that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial, bind over (B) the witnesses to appear at the sessions, and in case of their refusal either to come, or to be bound over, may commit them for their contempt in such refusal. 2 *H. H.* 282.

Two ways of causing witnesses to appear.

By the 27 G. 2. c. 3. When any poor person shall appear on recognizance in any court to give evidence against another accused of grand or petit larceny or other felony, the court may, at the prayer, and on the oath of such person, and on consideration of his circumstances, order the treasurer to pay him such sum as they shall think reasonable for his time, trouble, and expence; which order the proper officer shall make out for the fee of 6d.; except in *Middlesex*, where the same shall be paid by the overleers of the poor where the person was apprehended.

Charges of witnesses.

And by the 18 G. 3. c. 19. The court where any person shall appear on recognizance or *subpœna* to give evidence as to any grand or petit larceny or other felony, whether any bill of indictment be preferred or not, may order the treasurer to pay to him such sum as they shall think reasonable, not exceeding the expences he was *bona fide* put unto, making also, if he shall appear to be in poor circumstances, a reasonable allowance for his trouble and loss of time; which order the clerk of assize or of the peace respectively shall forthwith make out and deliver to him, on being paid for the same 6d. and no more; and the treasurer upon sight of the order shall forthwith pay the same. *s. 8.*— And the justices in sessions from time to time may lay down and alter such rules and regulations concerning any costs or charges to be allowed to any person by virtue of this act, as to them shall seem just: which rules and regulations, having received the approbation and signature of one

one

one or more of the judges of assize, shall be binding on all persons whatsoever. *f. 9.*

Where a witness is a prisoner in execution.

Where a witness is a prisoner in execution for debt, he must be brought up by *habeas corpus ad testificandum*, to give his evidence. *St. Tr. V. 2. 580. .V. 4. 37.*

Witness how far privileged against an arrest.

One was subpoenaed *ad testificandum*, and prayed a privilege from being arrested, which was granted; and by the court, it will supersede an arrest upon *mesne* process, but not upon an execution; yet the sheriff in that case may be committed for his contempt. *Nevil's case, 15 C. 2. Trials per pais, 310.*

Penalty of a witness not appearing.

By the 5 *El. c. 9. f. 12.* If any person upon whom any process out of any of the courts of record within this realm shall be served, to testify or depose concerning any matter depending therein, and having tendered unto him, according to his countenance or calling, such reasonable sum for his costs and charges, as (having regard to the distance of the places) is necessary to be allowed in that behalf, do not appear according to the tenor of the process, having not a lawful and reasonable impediment; he shall forfeit 10*l.* and shall yield such further recompence to the party grieved, as to the judge of the court, out of which the process was awarded, shall seem meet, according to the loss that the party which procured the process shall sustain; to be recovered by the party grieved, in any court of record.

In the case of *Wyat and Winkford, 2 G. 2.* A motion was made for an attachment against a person for not attending at the assizes to give his evidence, being subpoenaed, and having received one guinea for his charges, and being promised to have one guinea a day while there, and his charges paid. And a rule was made to shew cause. And afterwards cause was shewed, that an attachment ought not to go, but the party injured had his action upon the statute of *Eliz.* but the court thought that it was a good foundation for an attachment, the disobedience to the subpoena being a contempt of the court; and though an action might be brought on the statute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witnesses not attending frequently upon trials, at which they were subpoenaed to appear and give evidence. And therefore the rule was made absolute. *L. Raym. 1529.*

In the case of *Small and Whitmill, M. 10 G. 2.* It was moved for an attachment against one *Wakefield*, for not attending

tending to give evidence, being served with a subpoena. The ticket and subpoena were not sworn to have been served personally; but delivered to a servant at the witness's house, who carried it up to his master, and brought down word, that he delivered it to his master, who said he would attend. By *L. Hardwicke* Ch. J. This way of proceeding by attachment is a new method. I do not know that it has been determined, that serving a subpoena on a servant, would be a sufficient service to maintain an action; but however, to be sure, it is not a sufficient ground for an attachment. And *Lee* J. said, It hath been solemnly determined, that you must not only have an affidavit of tending the shilling, but likewise of a tender of reasonable charges, to ground an attachment. And the attachment was denied. *Cas. Hardw. 313. Str. 1054.*

E. 14 G. 2. Chapman and Peyton. A witness was served with a subpoena at *Chester*, to attend the sittings at *Guildhall*, and two guineas were tendred by the person who served it, and being objected to as too little, he declared he would give no more. The witness not coming up, an attachment was moved for; but on shewing cause was discharged; the court saying it was too little, and that the witness is not obliged to trust to the court's allowing him more when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of punishing as for a contempt was new, and practised only in this court: the common pleas not doing it to this day, but leaving the party to his remedy on the 5 *El. c. 9.* and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the question, whether the non-attendance was thro' obstinacy or not. *Str. 1150.*

M. 22 G. 2. Bowles and Johnson. It was moved for an attachment against one *Yerburgh*, for not giving evidence at the assizes. He was subpoenaed, but had no offer to have his expences born; but came to the assizes, where money was tendred to him for that purpose, but he refused to be sworn.—By *Lee* Ch. J. Attachments are a new practice. I remember the first motion for them. It was then agreed, that the same restrictions should be used in attachments as in actions on the 5 *Eliz.* one of which is, that a tender of expences should be made at the service of the subpoena. In this case, *Yerburgh* has not been subpoenaed regularly, so as to subject him to the 5 *Eliz.* In order to be subject to an attachment, you must shew him guilty of a contempt of this court.—By *Wright* J. A person

person not properly subpoenaed is to be looked upon only as a stander-by; and it is no contempt of the court of *Nisi Prius*, for a stander-by to refuse to be examined, much less is it a contempt of this court. And the attachment was denied. *Black. Rep.* 36.

And, by the court, in the case of *Hammond and Stewart*, *H. 8 G.* the witnesses ought to have a reasonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themselves as possible. *Str.* 510.

In criminal cases if a witness hath been bound over, and do not appear, he shall forfeit his recognizance.

V. Of the manner of giving evidence.

Which party
shall be, in the
evidence.
Evidence to be
upon oath.

He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence. *Lit.* 36.

The evidence both for and against a prisoner ought to be upon oath.

And if a peer is produced as a witness, he ought to be sworn. *3 Keb.* 61.

Lord *Preston* was committed by the court of quarter sessions, for refusing to be sworn to give evidence to the grand jury on an indictment of high treason; and on his being brought by *habeas corpus* into the king's bench, *Holt Ch. J.* said, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed. *1 Salk.* 278.

Affirmation.

But a quaker's affirmation in all cases not being criminal, shall be allowed as evidence, without an oath; but in criminal cases his affirmation shall not be allowed, *7 & 8 W. c.* 34.

Must be positive.

It is no satisfaction for a witness to say, that he thinks or persuades himself; and this for two reasons; by *Coke Ch. J.* 1. Because the judge is to give absolute sentence, and ought to have more ground than thinking. 2. Because judges, as judges, are always to give judgment *secundum allegata & probata*, notwithstanding that private persons think otherwise. *Dyer* 53.

Witnesses may
be examined
apart.

The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. *St. Tr.* V. 4. 9.

Evidence to be
given in the pri-
soner's presence.

In cases of life, no evidence is to be given against a prisoner, but in his presence. *2 Haw.* 428.

H. 26 G. 3. K. v. Thomas Spencer Crowther (a): A conviction for killing game was quashed, because the same set forth only, that the deposition of *Edward Tye* the witness, which had before been sworn to before the justice, was again read over to him in the presence and hearing of the said *T. S. Crowther*, and that the said *Edward Tye* again affirmed his said deposition to be true in the presence and hearing of the said *T. S. Crowther*.—By the court: The witness ought to have been re-sworn in the presence of the defendant. *Caf. by Durnf. and East, 1 V. 125.*

In every issue, the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is sufficient to deny what is affirmed, until it be proved; but when the affirmative is proved, the other side may contest it with opposite proofs; for this is not properly the proof of a negative, but the proof of some proposition totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as that he was at another place at the time, or the like. *Theory of Evid. 116, 117.*

Witnesses cannot testify a negative.

But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. Therefore, in an information against lord *Holifax* for refusing to deliver up the rolls of the auditor of the exchequer: the court of exchequer put the plaintiff upon proving the negative, namely, that he did not deliver them; for a person shall be presumed duly to execute his office, till the contrary appear. *Id. 117.*

A prisoner may not call witnesses to disprove what his own witnesses have sworn. *St. Tr. V. 2. 764. 792.*

A man shall not disprove his own witnesses. Whether a witness may read his evidence.

A witness shall not be permitted to read his evidence, but he may look upon his notes to refresh his memory. *St. Tr. V. 445.*

A witness shall not be cross examined, till he has gone through the evidence for the party on whose side he was produced. *St. Tr. V. 2792.*

When he may be cross examined.

It hath been admitted, that in order to shew a variance in the evidence, a deposition taken by a witness before a justice of the peace, may at the prisoner's desire be read at the trial, in order to take off the credit of the witness, by shewing a variance between such depositions, and the

Variance.

(a) See this case more at large, tit. GAME.

evidence given in court. And for the same reason it seems agreed, that where a witness at one trial varies from his own evidence at another, in relation to the same matter, such variance may also be given in evidence to invalidate his testimony at the second trial. 2 *Haw.* 430.

Which party
shall conclude.

The counsel of that party which doth begin to maintain the issue, ought to conclude. *Trial per pais*, 220.

A. Subpœna to give evidence.

G EORGE the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth. To A. B. C. D. and E. F. greeting: We command you, and every of you, that all business being laid aside, and all excuses whatsoever ceasing, you do in your proper persons appear before our justices assigned to keep the peace in our county of — and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the general quarter sessions of the peace, to be holden at — in and for the said county, on — the — day of — at the hour of ten in the forenoon of the same day, to testify the truth, and give evidence on behalf of the inhabitants of the parish of — in the said county, against A. O. in a case of bastardy. And this you are in no wise to omit, nor any of you to omit, on pain of one hundred pounds. Witness Sir James Lowther, baronet, the — day of — in the — year of our reign.

C.

Note; There may be four witnesses put in one *subpœna*.

A subpœna ticket.

To Mr. A. W.

B Y virtue of his majesty's writ of subpœna to you directed, and herewith shewn to you, you are personally to be before his majesty's justices of the peace for the county of — at the general quarter sessions of the peace to be holden for the said county at — in the said county, on — the — day of — next, to testify the truth, and give evidence on behalf of the inhabitants of the parish of — in the said county, against A. O. in a case of bastardy. And this you are not to omit, upon pain of one hundred pounds. Dated this — day of — in the year —

By the court,

C.

B. Condition

B. Condition of a recognizance to appear and give evidence.

THE condition of this recognizance is such, that if the above bound A. W. shall personally appear at the next general quarter sessions of the peace to be holden at — in and for the said county, and then and there give such evidence as he knoweth, upon a bill of indictment to be exhibited by A. I. of — yeoman, to the grand jury, against A. O. late of — in the said county, yeoman, for the feloniously taking and carrying away — the property of — and in case the said bill be found a true bill, then if the said A. W. shall then and there give evidence to the jurors that shall pass on the trial of the said A. O. upon the said bill of indictment, and not depart thence without leave of the court, then this recognizance to be void, otherwise of force.

Summons of a witness. See *Summons*.

Examination.

IF a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. *Dalt. c. 164.*

A person charged with suspicion of felony.

In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

Information to be taken.

Two or more justices (1 Q.) or one of the said justices, before they bail a person apprehended for felony (if the offence is bailable) shall take his examination (A) and the information (B) of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing; which examination they shall certify (together with the bailment) at the next general gaol delivery, to be holden within the limits of their commission. 1 & 2 P. & M. c. 13. s. 4.

And

Examination.

And they shall have power to bind by recognizance (C) all such as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to be bolden within the county where the trial shall be, then and there to give evidence against the party; and shall certify such recognizance in like manner. f. 5.

And if they offend in any thing herein, they shall be fined by the justices of gaol delivery. 1d.

In like manner, where the person is not bailed, but committed to ward, the justice or justices who commit him, shall before such commitment take the like examination and information, and shall put the same in writing within two days after the said examination, and shall in like manner bind over the witnesses; and certify the whole as above. 2 & 3 P. & M. c. 10.

How long the prisoner may be detained before examination.

Shall take his examination] And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice, for farther examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 H. H. 585.

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 Haw. 119.

Prisoner's examination not to be upon oath. Examination may be signed.

The examination of the person accused ought not to be upon oath, 1 H. H. 585.

But if upon his examination he shall confess the matter, it shall not be amiss that he subscribe his name or mark to it. Dalt. c. 164.

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 H. H. 585. 2 Haw. 429.

Witnesses.

Information of them that bring him] Or of other witnesses, whom the justice may bring before him by his warrant (D) for that purpose. 1 H. H. 586. Dalt. c. 164.

To be examined on oath.

And this information must be upon oath, Dalt. c. 164. 1 H. H. 586.

Quakers.

And therefore, if a quaker is witness, his affirmation must not be taken in this case; for by the 7 & 8 W. c. 34. s. 36. it is provided, that no quaker shall be examined

mined for or against any person in any criminal cause, unless it be upon oath.

And the said information being upon the trial sworn to be truly taken, by the justice or his clerk, may be given in evidence, against the prisoner, if the witnesses be dead or not able to travel. 1 H. H. 586. May be given in evidence.

Or as much thereof as shall be material to prove the felony] Yet it seemeth also just and right that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner: for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter. *Dalt. c. 165.*

Shall certify at the next gaol delivery] And yet for petty larcenies, and small felonies, the offenders may be tried at the quarter sessions, and the examinations and informations may be certified thither. *Dalt. c. 164.* Examination to be certified to the place of trial.

To be bolden within the limits of their commission] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c. 164.*

To bind by recognizance] And upon refusal may commit the person refusing. 1 H. H. 586. Prosecutor to be bound to appear and give evidence.

And the parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c. 164.*

A Examination of a felon.

Westmorland. **T**HE examination of A. O. of ——— yeoman, taken before me Henry Chaytor, doctor of laws, one of his majesty's justices of the peace for the said county [or, in the case of bail, —taken before us ——— two of his majesty's justices of the peace for the said county, and one of us of the quorum] the ——— day of ——— in the ——— year of the reign of ———

The said A. O. being charged before me [or, us] by A. I. of ——— yeoman, with the felonious stealing out of the house of the said A. I. at ——— on the ——— day of ——— the following goods, to wit, ——— of the value of ——— he the said A. O. upon his examination now taken before me [or, us] confesseth that ——— [or, denieth that ———], &c.

Examination.

B. Information of a witness.

Westmorland. **T**HE information of A. I. of ———
yeoman, taken upon oath before me [as
before].

C. Recognizance to give evidence.

Westmorland. **B**E it remembered, that on the ———
day of ——— in the ——— year of
the reign of ——— A. I. of ——— in the said county, yeo-
man, did come before me Henry Chaytor, doctor of laws, one
of the justices of our said lord the king, assigned to keep the peace
in the said county, and did acknowledge himself to owe to our said
lord the king ten pounds of lawful money of Great Britain, un-
der condition, that if he shall personally appear before the justices
of our said lord the king, at the next general quarter sessions of
the peace [or, gaol delivery] to be holden in and for the said
county, then and there to give evidence in behalf of our said
lord the king, against A. O. late of ——— who being at-
tached, and suspected of felony, is now committed to the gaol of
our said lord the king in the said county, then this recognizance
to be void, otherwise of force.

Or thus, to prefer a bill of indictment, and give
evidence.

Westmorland. **B**E it remembered, that on the ——— day
of ——— in the ——— year of the reign
of ——— A. I. of ——— in the said county, yeoman,
personally came before me Henry Chaytor, doctor of laws, one
of the justices of our said lord the king, assigned to keep the
peace in the said county, and acknowledged himself to owe to our
said lord the king, the sum of ——— of good and lawful money
of Great Britain, to be made and levied of his goods and chat-
tels, lands and tenements, to the use of our said lord the king,
his heirs and successors, if he the said A. I. shall fail in the
condition indorsed. H. C.

*The condition of the within written recognizance is such, that
whereas one A. O. late of ——— was this present day brought
before the justice within mentioned by the within bounden A. I.
and was by him charged with the felonious taking and carrying
away ——— of the goods of him the said A. I. and there-
upon was committed by the said justice to the common gaol in and
for*

for the said county: if therefore be the said A. I. shall and do at the next general quarter sessions of the peace [or, gaol delivery] to be holden in and for the said county, prefer or cause to be preferred, one bill of indictment of the said felony against the said A. O. and shall then also give evidence there concerning the same, as well to the jurors that shall then inquire of the said felony, as also to them that shall pass upon the trial of the said A. O. that then the said recognizance to be void, or else so stand in full force for the king.

D. Warrant for a witness.

Westmorland. { To the constable of ———

WHEREAS oath hath been made before me ——— one of his majesty's justices of the peace in and for the said county, by A. I. of ——— yeoman, that he the said A. I. was lately robbed at ——— and that he hath good cause to believe that A. W. of ——— is a material witness to prove by whom the said robbery was committed: These are therefore to require you to cause the said A. I. forthwith to come before me, to give such information and evidence as he knoweth concerning the said offence, that such further proceeding may be had therein, as to the law doth appertain. Given under my hand and seal at ——— in the said county, the ——— day of ———.

END OF THE FIRST VOLUME.

ERRATA in Vol. I.

- Page 33. line 36. *for* 27 *G.* 3. *read* 27 *G.* 2.
 221. — 14. *for* (above) *read* (below).
 242. — 19. *for* c. 1. *read* c. 12.
 270. — 10. *for* in the case *read* in the above case.
 21. *for* f. 7. *read* c. 7.
 323. — 26. *for* 294 *read* 394.
 530. in the margin, after adjourning *add* view.
 540. line 27. *for* in *read* into.
 588 — 21. *for* 11 *G.* 3. *read* 11 *G.* 2.
 606. — 9. *for* 27 *G.* c. 20. *read* 27 *G.* 2. c. 20.
 632. — ult. *for* accurate *read* accurate.



